

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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5 In the Matter of:

6 LEHMAN BROTHERS HOLDINGS INC., Case No. 08-13555-scc

7 Debtor.

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10 United States Bankruptcy Court

11 One Bowling Green

12 New York, New York 10004-1408

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14 December 4, 2017

15 10:05 AM

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23 B E F O R E:

24 HON. SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 IN RE: RMBS Claims Estimation Trial

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25 Transcribed by: Dawn South and Sherri L. Breach

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P R O C E E D I N G S

THE COURT: Thank you. Please have a seat.

MR. COSENZA: Good morning, Your Honor.

THE COURT: How's everyone? Good weekend? You're confusing me, Mr. Shuster, you're in the wrong spot, either that or there was a hair swap of some kind.

All right. I'm ready when you are.

MR. COSENZA: Your Honor, so we'll move forward and call Professor Daniel Fischel at this time.

THE COURT: Very good. Please come up, Professor. If you would step up and raise your right hand, please.

PROFESSOR DANIEL R. FISCHEL, WITNESS, SWORN

THE COURT: Very good. Have a seat and make yourself comfortable. I see someone has given you some water.

MR. COSENZA: Your Honor, may we approach?

THE COURT: Okay.

MR. COSENZA: We've handed binders. I'm going to hand one to the witness.

THE COURT: We'll take a break after about an hour and a half or so, but if you'd like a break before then just let us know. All right?

THE WITNESS: Thank you, Your Honor. Appreciate that.

THE COURT: All right. And it is a little warm in

1 here, and you're welcome to take your jacket off if that
2 would make your more comfortable.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Okay, Mr. Cosenza.

5 MR. COSENZA: Great. Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. COSENZA:

8 Q So, Professor Fischel, we handed you a binder, so
9 during the course of my examination I'll refer you to
10 certain tabs in your binder. But for current purposes you
11 can, you know, leave it to the side unless you need to refer
12 to something.

13 A Okay.

14 Q So, Professor Fischel, where are you employed?

15 A I'm employed at two places. I'm employed at the
16 University of Chicago and also by an economic consulting
17 firm by the name of Compass Lexecon.

18 Q Professor, what is Compass Lexecon?

19 A Compass Lexecon is an economic consulting firm that
20 specializes in the application of economics to primarily
21 legal and regulatory disputes.

22 Q Professor, can you give the Court a sense of Compass
23 Lexecon's personnel and its clients?

24 A Yes. We, somewhat to my surprise, we've grown into an
25 international business and we have personnel all over the

1 world. Mostly economists of various levels of degrees. And
2 we also have various affiliations with various leading
3 academics in their fields ranging from a number of Nobel
4 prize winners on down.

5 And our clients really run the gamut from private
6 firms, state and governmental agencies, investors, really
7 any party that can be involved -- either is involved or
8 potentially involved in a legal or regulatory dispute would
9 be the type of client typically through their counsel that
10 would retain us.

11 Q And how many employees do you have approximately at
12 Compass Lexecon?

13 A I think in terms of professionals approximately 400.

14 Q Okay. And what is your role at Compass Lexecon?

15 A I have two roles. I'm the president of the firm, so in
16 that sense I have overall responsibility for the entire
17 firm. And I also have an active consulting practice and a
18 role as an expert witness in areas related to my fields of
19 specialization, which generally involve valuation or
20 financial markets to one degree or another.

21 Q Do have also any academic -- currently any academic
22 positions?

23 A I do. I'm currently --

24 Q Can you describe for the Court what they are?

25 A Yeah. I'm currently the Lee & Brenna (ph) professor of

1 law and business emeritus at the University of Chicago Law
2 School.

3 Q Previous prior to that have you held any other academic
4 positions?

5 A Yeah. Well I held the same chair before I became
6 emeritus for many years. I also had a joint appointment at
7 the University of Chicago Graduate School of Business for a
8 number of years. I was dean of the University of Chicago
9 Law School for a number of years. I was head of the
10 university-wide law and economics program at the University
11 of Chicago for many years. And also for a period of years I
12 held a position at Northwestern Law School and also again
13 had a parallel courtesy appointment at the Northwestern
14 Graduate School of Business.

15 Q Great. So, Professor, could you describe your
16 educational background beginning from high school going
17 forward chronologically?

18 A Well, I'm a proud graduate of Bronx High School of
19 Science.

20 Q That we talked about earlier.

21 A That's what we were just talking about. And then I
22 went to Cornell University where I had a major in history
23 and a minor in economics. Then I went to graduate school in
24 history for a short period. And then I went to the
25 University of Chicago Law School where I studied law

1 obviously, but also law and economics with members of the
2 University of Chicago faculty.

3 Q And can you describe briefly what you did after your
4 graduated from law school?

5 A Yes. I clerked for two years. First for the Honorable
6 Thomas Fairchild, who was then the chief judge of the
7 Seventh Circuit Court of Appeals in Chicago. And then I had
8 the great honor of clerking for Justice Potter Stewart of
9 the United States Supreme Court.

10 Then I practiced law for a very short time, less than a
11 year, and then I began my academic career first at
12 Northwestern and then at the University of Chicago.

13 Q You mentioned this briefly before, but maybe you can
14 just give us -- describe, you know, briefly the courses that
15 you've taught as a professor, both at Northwestern and at
16 the University of Chicago.

17 A I've taught again law school and the business school
18 primarily courses in business organizations, financial
19 markets, and various advanced courses in those areas.

20 Q Okay. Have any of the courses that you've taught dealt
21 with any of the issues that arise in this estimation
22 proceeding?

23 A Yes.

24 Q What are they?

25 A I taught, for example, the economics of voting and why

1 when the interests of participants are aligned there is a
2 logic to basing voting rights on the economic stake of the
3 participants. You know, for example, the one share, one
4 vote rule in business law or corporate law as opposed to the
5 one citizen, one vote rule in the political arena.

6 I've also taught the economics of principal agent
7 relationships and fiduciary responsibilities in an economic
8 context. That's been a theme through many of my courses.

9 Q And you've also taught that in a context of trust
10 agreements as well?

11 A Yes.

12 Q Are you a member of any professional organizations?

13 A Yes. I'm a member of the American Economic Association
14 and the American Finance Association.

15 Q Do you have any other professional affiliations?

16 A Yes. I'm a member of the Board of Overseers of the
17 Becker Friedman Institute at the University of Chicago. I'm
18 a former chairman of the American Association of Law
19 School's section on law and economics. I've been an advisor
20 to the Harvard program on corporate governance. A former
21 member of the Center for the Economy and Estate at the
22 University of Chicago. And I've also been a referee for a
23 number of professional and economics journals.

24 Q Okay. And have you authored any publications,
25 Professor Fischel?

1 A I have. I've written two books, one, a book entitled
2 The Economic Structure of Corporate Law, coauthored with now
3 Judge Frank Easterbrook, who's a frequent coauthor of mine.
4 And I published approximately I think about 50 articles in
5 law and economics journals.

6 Q Okay. And have any of your books or articles ever been
7 cited by courts?

8 A Yes, hundreds of times. Numerous times by the United
9 States Supreme Court and courts of all levels below the
10 Supreme Court.

11 Q Have you been invited to lecture to various audiences?

12 A Yes, I've lectured widely to various different types of
13 audiences ranging from conferences of federal and state
14 judges, various business groups, legal groups, the Bar
15 Association of the City of New York.

16 I've also been an invited speaker to federal regulatory
17 agencies, the Securities and Exchange Commission in
18 particular.

19 And I've also spoken at most of the major universities
20 in the country.

21 Q And what are some of the topics that you've lectured
22 on, Professor?

23 A Well again areas relating to my areas of
24 specialization. So, you know, it could be anything from how
25 to calculate damages in business cases or fraud cases. How

1 to draw the line between public information and inside
2 information and insider trading cases. What is a reasonable
3 takeover policy for the New York Stock Exchange. I actually
4 left them off in my list of entities that I've spoken to.
5 So, you know, I would say subjects such as those.

6 Q Now, have you ever served as a consultant on economic
7 issues for a government agency or a regulatory body?

8 A Yes.

9 Q Describe those briefly for the Court.

10 A I've been a very frequent expert witness for the United
11 States Department of Justice in a variety of different types
12 of matters. And I've also been a consultant advisor to many
13 of the federal regulatory agencies, the federal banking
14 agencies, the Securities and Exchange Commission, the
15 Federal Trade Commission, and also many of the self-
16 regulatory bodies. The New York Stock Exchange, the
17 National Association of Securities Dealers, the Options and
18 Futures Exchanges, some of the regulatory exchanges in other
19 countries. So I've done that throughout my career.

20 Q Professor Fischel, have you previously testified as an
21 expert witness?

22 A Many times.

23 Q Okay. Have you ever testified as an expert in a
24 bankruptcy court proceeding?

25 A Yes, many times.

1 Q Okay. Have you done any work relating to mortgage-back
2 securities and residential mortgage loans and other
3 settlements?

4 A Yes, extensive.

5 Q Do you just want to describe briefly for the Court your
6 role in those settlements? And we can go through them in
7 more detail.

8 A Well a number of years ago there was an \$8.5 billion
9 settlement that Bank of America entered into for its alleged
10 liabilities for its sale of mortgage-back securities, and as
11 a result of that settlement there was I guess known as an
12 Article 77 proceeding where the court had to approve that
13 settlement. It was a lengthy trial that was held where I
14 was an expert witness supporting the settlement over the
15 objections of some of the claimants, and that settlement was
16 ultimately approved.

17 Then after that there was a J.P. Morgan settlement for
18 \$4.5 billion, again, similar to the earlier Bank of America
19 settlement. Similar Article 77 proceeding. Again, a
20 hearing or trial was held over a period of time, and again,
21 I was a witness that was called to testify in support of the
22 settlement over the objections of some of the claimants.
23 Again, that settlement was ultimately approved by the court.

24 I've also submitted a lengthy report involving
25 mortgage-back securities obligations of Washington Mutual,

1 WAMU, where that settlement was approved without testimony.

2 I've also had I would say a continual course of dealing
3 with different trustees about advice about settlements,
4 whether to approve particular settlements, valuing -- or
5 what cases should be settled at.

6 So I would say I've done a lot of work in that area.

7 Q You mentioned the Bank of America. Is that case
8 referred to in your expert report in this matter?

9 A Yes.

10 Q Which matter was that for Bank of America?

11 A Well let me see exactly how it's referred to. It's the
12 \$8.5 billion settlement. Excuse me for one second, let me
13 just find it. But it's -- can I refer to my expert report?
14 It's described in paragraph 5 of my expert report.

15 Q Okay. And who were you -- who selected you to serve as
16 an expert in that matter?

17 A Various trustees that were primarily represented by the
18 firm of Mayer Brown.

19 Q Okay. And then you mentioned the subsequent settlement
20 for -- earlier I believe for J.P. Morgan.

21 A Right.

22 Q And who were you -- who selected you to serve as an
23 expert in that matter?

24 A Again, various trustees in that case as well.

25 Q And similarly I think you mentioned a J.P. Morgan and

1 Washington Mutual matter, who selected for you to serve as
2 an expert in that matter?

3 A It's the same thing, various trustees.

4 Q Have you done any other work relating to mortgage-back
5 securities and residential mortgage loans?

6 A Yes. First of all --

7 Q Can you describe that for the Court, please.

8 A I'm sorry, I've been involved in a number of big
9 securities fraud cases where particularly financial
10 institutions were alleged to have misled investors by not
11 accurately reporting their liabilities and potential
12 liabilities for their mortgage-back securities activities.

13 So many of the cases that I testified in as an expert
14 for the United States Department of Justice following the
15 Supreme Court's decision in United States versus Winstar
16 after the passage of FIRREA involved damage claims by
17 financial institutions that were based on their what I guess
18 I would call their but for world of what would have happened
19 if they had been allowed to invest more money in mortgage-
20 back securities.

21 So much of my testimony in those cases on behalf of the
22 Department of Justice dealt with the economics of mortgage-
23 back securities, the preference of mortgage-back securities,
24 the riskiness of mortgage-back securities. So I would
25 include that as well.

1 Q Okay. Professor Fischel, moving on from residential
2 mortgage-back securities, do you have any other experience
3 regarding settlements outside of that context?

4 A Yes. A number of years ago there was a settlement in a
5 securities fraud case involving AIG, and subsequent to the
6 settlement there was an objection by the New York State
7 Attorney General on the ground that one of the experts
8 involved in the litigation, whose analysis was the basis of
9 the settlement, was alleged to have committed a serious
10 error, and a claim was made for that reason the settlement
11 should be reopened. And I was then retained by the parties
12 to do an independent analysis of what the error was, how
13 serious it was, and to what extent it likely influenced the
14 terms of the settlement. And I performed an analysis,
15 submitted a report to the court, and again, the court
16 ultimately upheld the settlement.

17 Q It was based on your analysis?

18 A In part. I mean --

19 Q Yes.

20 A -- there was a lot of work done, but the court cited my
21 analysis favorably in her decision to approve the
22 settlement.

23 MR. COSENZA: So, Your Honor, pursuant to federal
24 Rules of Evidence 702 I'm going to tender Professor Fischel
25 as an expert on the economic evidence related to the

1 estimation of the RMBS claims at issue here.

2 THE COURT: Mr. Goldberg?

3 MR. GOLDBERG: No objection, Your Honor.

4 THE COURT: Very good.

5 BY MR. COSENZA:

6 Q So, Professor Fischel, what was your assignment -- just
7 getting on -- moving on to this matter. What was your
8 assignment in this case?

9 A It was primarily to analyze the competing claims
10 between Lehman and the trustees in terms of their proposed
11 allowed claims in this estimation proceeding.

12 Q And did you summarize your analysis in a report that
13 was submitted in this matter?

14 A I did.

15 Q Okay. Would it be helpful to have a copy of that
16 report with you as you testify today?

17 A Yes, it would.

18 Q Okay. So I'm going to refer you to tab 1 in the binder
19 I gave you and to the Court and the trustees' counsel
20 earlier. Tab 1 of that binder is your report. Can you just
21 confirm that that is your report?

22 A It is.

23 Q Okay. And based on your analysis and what's contained
24 in your report did you form any opinions?

25 A I did.

1 Q Okay. And have you prepared a demonstrative that
2 summarizes your opinions?

3 A Yes, I have.

4 MR. COSENZA: Can we please pull up Plan
5 Administrator Exhibit 774.

6 BY MR. COSENZA:

7 Q Professor Fischel, is this the demonstrative that you
8 prepared that summarizes your opinion?

9 A Yes.

10 Q Could you walk the Court through the summary of your
11 opinions?

12 A Yeah. Well hopefully they're fairly self-explanatory.
13 But I have two opinions.

14 And my first opinion is that the behavior of the
15 institutional investors, particularly in connection with the
16 2015 settlement, supports the covered loan claims that
17 Lehman has advanced, and is inconsistent with the proposed
18 allowed claim of the trustees in this matter.

19 And my second opinion is that Lehman's proposed allowed
20 claim is at the higher end of the range of settlement values
21 that I've reviewed. And again, the trustees proposed
22 allowed claim is far outside the range of comparable
23 settlements that -- the results of comparable settlements
24 that I've reviewed.

25 Q Thank you. For current purposes let's focus on your

1 first opinion, and your first opinion is that the behavior
2 of institutional investors supports estimating the covered
3 loan claims at Lehman's proposed allowed claim. Can you
4 detail that opinion for the Court and the basis for your
5 opinion?

6 A Yeah. Well I mean first of all when you're dealing
7 with the economics of the settlement you have to think about
8 who the parties are in terms of who's going to gain and
9 who's going to lose as a result of making either a good
10 decision or a bad decision.

11 And in this particular case, as I think I'll have a
12 chance to explain in the next few minutes, the institutional
13 investors had the largest economic stake in the proposed
14 claim. They were the most sophisticated, the most
15 experienced, virtually all of them had been involved in
16 every prior comparable settlement negotiating an outcome,
17 and most importantly they don't have any incentive to make
18 the wrong decision because they're going to be -- they and
19 their clients are going to be poorer as a result, they're
20 going to leave money on the table if they settle at -- or if
21 they agree to settle at too low of a value.

22 And so because they are the interested party on one end
23 of the transaction, they're the ones that are going to be
24 receiving the money, they're judgment, particularly given
25 their economic stake, their sophistication, and their

1 experience, in my opinion is entitled to significant
2 deference.

3 And under the circumstances of this case, particularly
4 in connection with the 2015 settlement and the judgment that
5 they reached in connection with the 2015 settlement, I do
6 feel that their willingness there to settle their claim for
7 approximately I think it was \$2.4 billion at the time before
8 some of the trusts dropped out, as I said, I think it's
9 entitled to significant deference, which is why it's my
10 first opinion.

11 Q Do you know why the trustees did not accept the October
12 2015 settlement that was entered between Lehman or the plan
13 administrator and the institutional investors?

14 A I've asked that question many times based on my
15 conclusion that it should have been accepted. I was told
16 that it wasn't accepted because of an expert report that was
17 submitted to the trustees. I've repeatedly requested the
18 ability to get access to that expert report just to try and
19 understand the basis for why I thought a very sensible
20 outcome that was reached in 2015 wasn't pursued, and I was
21 told that that expert report was not available so I couldn't
22 get access to it. But that's my understanding.

23 Q Professor Fischel, moving you to -- actually moving you
24 to PA Exhibit 775, which I believe is tab 3 in your binder.
25 Did you prepare a demonstrative that shows each

1 institutional investors stake in this case?

2 A Yes.

3 Q Is PA Exhibit 775, which is tab 3 in your binder, is
4 that the demonstrative that you prepared?

5 A Yes.

6 Q What is the source of the information in this document?

7 A The source of the information as reflected on the -- at
8 the bottom of the exhibit is information that was submitted
9 in connection with this proceeding.

10 Q Okay. And can you walk us through this demonstrative?

11 A Yes. What this demonstrative shows is the identity of
12 the difference institutional investors and the face value of
13 their -- the amount of their investment in terms of the
14 total face value, and most importantly, the unpaid principal
15 balance of the outstanding unpaid principal balance.

16 And I think the various entries again hopefully
17 are self-explanatory, but what I think is particularly
18 significant is the last three lines going across at the
19 bottom of the exhibit where you can see that the total
20 unpaid principal balance of the institutional investors is
21 approximately \$6 billion of the total unpaid principal
22 balance for all trusts of a little over \$25 billion, so that
23 the percent ownership held by the institutional investors is
24 approximately 24 percent of the total, and there is no other
25 entity or collection of entities acting together that have

1 anywhere near as large a stake as the institutional
2 investors. And for that reason, because they have the most
3 to gain by making a good decision and the most to lose by
4 making a bad decision, they have the best incentives in some
5 sense to value the claims at the right amount to reach an
6 appropriate settlement not just on their behalf but on
7 behalf of all of the certificate holders.

8 Q So, Professor, looking at the names of the
9 institutional investors here, and we can get to them in more
10 detail in a minute, but these are some of the more
11 sophisticated -- or most sophisticated financial players,
12 you know, frankly in the world.

13 A Right. And I --

14 Q Goldman Sachs.

15 A -- was going to mention that in connection with another
16 exhibit --

17 Q Yes.

18 A -- but it's Black Dot, Goldman Sachs, MetLife, PIMCO,
19 many others. You can see PIMCO by itself has over a
20 \$3 billion stake in terms of the unpaid principal balance.
21 And again, these entities have not just large stakes, but as
22 I think will be -- as clear from their names and also from
23 other exhibits, they're the shrewdest, most experienced
24 financial investors in the world, and they have no incentive
25 to reach the wrong decision about what the claims should be

1 settled for, which is why I think -- certainly one of the
2 reasons why I think their decision to resolve the dispute in
3 2015 for approximately \$2.4 billion was entitled to
4 substantial deference, and because that number, particularly
5 as adjusted as a result of the trusts -- the few trusts that
6 have dropped out, is basically the Lehman's proposed allowed
7 claim in this proceeding.

8 That's again basically my first opinion why I think the
9 institutional investors' judgment should be entitled to
10 substantial deference and why Lehman's proposed allowed
11 claim in this proceeding is far more credible than the
12 trustees', which is, you know, approximately \$9 billion
13 higher than what the institutional investors were willing to
14 revolve their claim for in 2015.

15 Q So following on from that testimony, Professor, did you
16 -- I refer you to tab 4 of your binder, it's PA Exhibit 776.
17 Is this another demonstrative that you compiled?

18 A Yes.

19 Q And is this demonstrative again supposed to illustrate
20 the sophistication of the institutional investors?

21 A Yes. And again, I think this is again somewhat obvious
22 just because of the names of the institutional investors,
23 but what this exhibit shows is that the institutional
24 investors have assets either owned or managed by them in
25 excess of \$5 trillion. And again, just showing not only

1 that they are important and sophisticated, but a lot of
2 countless numbers of other sophisticated investors, and even
3 unsophisticated investors, have been willing to trust their
4 judgment by allowing these institutional investors to manage
5 their funds in addition to the funds that the institutional
6 investors own themselves.

7 Q Now, Professor, if you walk through this list of people
8 -- entities listed on I guess the second column, the
9 institutional investor group, this is a diverse group of
10 financial institutions. Just want to describe briefly the
11 different categories where they fall in terms of their
12 participation in the market?

13 A Yes. These are a combination of insurance companies
14 and investors, financial institution investors, and just
15 investment advisors. Just different categories of very
16 sophisticated institutional investors.

17 Q Why is there the fact that they have these significant
18 amount of assets under management? Why again, why is that
19 relevant for you in your analysis?

20 A Well first of all it's a proxy for sophistication and
21 success in the marketplace that their judgment has stood the
22 test of time in terms of being validated in the marketplace.
23 But again, an implication of that is that these are assets
24 both owned and managed. Meaning that countless other
25 entities have trusted the judgment of these institutional

1 investors to make prudent judgments on their behalf. And
2 again, in the context of this case, one of the prudent
3 judgments is what to settle the claims for. And again,
4 because of the enormous disparity between the Lehman
5 proposed allowed claim, which is basically identical to what
6 the institutional investors decided, and the trustees'
7 proposed allowed claim, which again is -- bears no
8 relationship to the judgment that the institutional
9 investors made, when their own money was at stake, their own
10 money that they owned as well as the money that they managed
11 for others, you know, that to me was highly significant.

12 Q Changing topics slightly. Did you put together a
13 demonstrative as part of your work here showing the
14 involvement of the institutional investors in negotiating
15 other large RMBS settlements?

16 A Yes, I did.

17 Q I think you testified about that earlier that these
18 institutional investors had been involved in those prior
19 settlements. If I could just refer you to tab 5, it's Plan
20 Administrator Exhibit 777. Is that the demonstrative that
21 you put together?

22 A Yes. What this shows is the involvement of the
23 institutional investors in this proceeding, but also in the
24 proceedings that -- of the settlements that I consider to be
25 the most comparable to this proceeding. And you can see

1 from the X's that there's substantial overlap.

2 And if you look I guess at the second to last line on
3 the bottom going across you see that there are 14 investors
4 -- 14 institutional investors involved in the institutional
5 investor group in this proceeding, and of those 14, 12 were
6 involved in the Citigroup settlement, 12 were involved in
7 the Countrywide settlement, 13 were involved in the JPM
8 settlement, and 12 were involved in the Rescap settlement.

9 So in addition to the overall sophistication and large
10 economic stake that these institutional investors held,
11 they're very experienced in negotiating settlements.
12 They've been involved in negotiating every single large RMBS
13 put-back settlement.

14 And again, to me that just makes their judgment all
15 that much more credible and the trustees' proposed allowed
16 claim that much less credible because it bears no
17 relationship to what sophisticated, experienced market
18 participants with their own money at stake and their own
19 client's money at stake made a decision in 2015 as to what
20 value their claim should be resolved at.

21 Q Before we move on to your second opinion just to
22 summarize. You know, I think you said this before, but why
23 was the support of the institutional investors important to
24 you in distinguishing between Lehman and the trustees'
25 proposed allowed claims?

1 A You know, again, I think I've tried to make this clear,
2 so I don't want to be too repetitive. But basically it's
3 because the Lehman's proposed allowed claim completely
4 matches the judgment of the most sophisticated, experienced
5 institutional investors who have the largest economic stake,
6 the most to gain and the most to lose by making either the
7 right decision or the wrong decision, and the trustees'
8 proposed claim bears absolutely no relationship to what
9 people in the marketplace with their own wealth at stake and
10 their own client's wealth at stake decided the claim should
11 be resolved for.

12 Q Okay.

13 MR. COSENZA: Can we please pull back up Plan
14 Administrator Exhibit 774.

15 BY MR. COSENZA:

16 Q This is the summary of your opinions. We're now going
17 to move on, Professor Fischel, to your second opinion. And
18 your second opinion is that Lehman's proposed allowed claim
19 is at the higher end of the range of recent settlements of
20 comparable claims, while the trustees' proposed allowed
21 claim is far above this range.

22 Have you analyzed settlements in prior engagements? I
23 think you testified to this earlier.

24 A Yeah. I think it's routine in disputes analyzing the
25 value of settlements and even prior to disputes just to

1 reach informed judgments.

2 Q And why is that important, Professor Fischel?

3 A Because cases -- other cases that result in
4 settlements, particularly if they involve similar types of
5 claims, in this case put-back claims over a comparable time
6 period, in this case primarily resulting in following the
7 housing crisis, involving similar legal theories, the
8 judgment that informed parties reached in similar, even
9 though not identical matters, is typically considered and
10 considered by me to be relevant in analyzing the
11 reasonableness of any particular settlement.

12 Q Are there any limitations to the relevance of
13 settlements of comparable claims?

14 A Yeah, and the limitation is what I said, the comparable
15 does not mean identical.

16 So frequently I think appropriate to look to see
17 whether a particular settlement is within the range of
18 comparable settlements because it's impossible to exactly
19 quantify how one settlement should relate to another
20 settlement, because you can't quantify all the different
21 factors that distinguish one case from other cases, but what
22 you can do is identify factors which are similar or
23 comparable, and then again, analyze whether a particular
24 settlement falls within the range of previous settlements
25 that involve similar type claims over similar time periods.

1 Q Okay. And how did you identify in your expert report
2 here the settlements of comparable claims that you evaluated
3 in this matter?

4 A Basically from what I just said, that I looked for,
5 based on my own experience, review of analyst reports and
6 other secondary material, I looked for other cases, again,
7 primarily involving put-back claims, involving -- claims
8 involving alleged breaches of representations and warranties
9 in the time period including and following the housing
10 crisis, and I also focused on cases involving large numbers
11 of trusts, because in any case involving a single trust or a
12 single loan group there can be idiosyncratic factors that
13 are hard to account for. So that's why I looked at
14 settlements involving large numbers of trusts that fit the
15 other criteria that I mentioned.

16 Q And you selected a group of prior matters that you
17 thought were comparable to the scale of the claims that are
18 at issue here?

19 A I did. And not just that I consider it to be
20 comparable, but others consider it to be comparable also,
21 including investment analysts and others who are involved in
22 these types of disputes.

23 Q Okay. Professor Fischel, have you prepared a
24 demonstrative that shows the settlements that you evaluated
25 in connection with this engagement?

1 A I have.

2 MR. COSENZA: Can we please pull up Plan
3 Administrator Exhibit 778.

4 BY MR. COSENZA:

5 Q And this is similar to what's in table 1 of your expert
6 report. So it's at tab 6 in the binder. Is this the
7 demonstrative that you prepared here?

8 A Yes.

9 Q Can you walk the Court through the different columns
10 here and the different cases that you selected?

11 A Yeah. I mean there's a lot of information on this
12 particular exhibit, and so --

13 Q Maybe we can start with what's in the cash
14 consideration or allowed claim and go from there, and go
15 across.

16 A Okay. Actually I just want to make clear the column
17 before that, the A column --

18 Q Uh-huh.

19 A -- has the Lehman's proposed allowed claim, the
20 trustees' proposed allowed claim, and then the series of
21 settlements that I consider to be the most comparable.
22 Countrywide, JPM, Citigroup, Rescap, and WAMU.

23 Q And again, why did you -- not to interrupt -- but why
24 -- these are obviously settlements you referenced earlier,
25 you served as an expert in some of those -- why did you

1 select those cases as the comparable settlements?

2 A Because they fit the criteria that I mentioned, they're
3 cases involving large trusts where the focus was on put-back
4 claims for alleged breaches of representations and
5 warranties in a time period, including and following the
6 housing crisis.

7 Q Okay. So moving on here.

8 A Yeah. So column B is the cash consideration paid in
9 the settlements or the proposed allowed claim. And again,
10 going down column B I think the numbers are fairly self-
11 explanatory.

12 But the first thing you see is the radical difference
13 between the Lehman's proposed allowed claim of \$2.38
14 billion, which again as I've said, matches the judgment of
15 the institutional investors with their own money at stake
16 and their own client's money at stake.

17 The next line is the trustees' proposed allowed claim
18 of \$11.65 billion.

19 Then comes the cash paid in the comparable settlements
20 that I've looked at, \$8.5 billion in Countrywide. Again,
21 testified in that settlement proceeding. \$4.5 billion in
22 JPM settlement. Again, I testified in that. And then
23 Citigroup, 1.125 billion. Rescap, 7.3 billion allowed
24 claim, because that was a bankruptcy proceeding. And WAMU
25 of three billion, which is a hybrid of a bankruptcy

1 proceeding in a non-bankruptcy proceeding.

2 Then the next column is the value of the non-cash
3 consideration, to the extent that there was non-cash
4 consideration, and you can see that there's only two
5 settlements where there was non-cash consideration, and only
6 one where the non-cash consideration was material. The
7 Countrywide settlement where the non-cash consideration was
8 valued at 2.5 billion to 3.1 billion in addition to the
9 8.5 billion cash payment, and that was for the value of
10 primarily servicing improvements and also some document
11 improvements.

12 The next column is the expected lifetime losses. And
13 you know, maybe I'm going to just stop reading all the
14 numbers into the record, because I think they're obvious. I
15 will say in Countrywide there was a big disparity because
16 there were different estimates of what the expected lifetime
17 losses were, which is why the range is reported there
18 between 67.75 billion and 107.8 billion, and that dispute
19 was not resolved so the range is reported there.

20 For all the others the expected lifetime losses were
21 not in dispute -- or are not in dispute, so the number is
22 reflected there.

23 And then the next two columns are really the most
24 important ones, which is the two recovery ratios.

25 First just focusing on the recovery ratio just based on

1 the cash that was paid or in the case of bankruptcy
2 proceeding the proposed claim. And what you can see is that
3 Lehman is at 11.2 percent, which is column B, the cash
4 consideration divided by the expected lifetime losses. And
5 again, you can see the radical difference between the
6 trustees' number of 55 percent and Lehman's proposed allowed
7 claim of 11.2 percent. But then significantly if you look
8 at the other comparable settlements, JPM 7 percent,
9 Citigroup 8.3 percent, Rescap 6.9 percent, WAMU 13.2
10 percent, Lehman's proposed allowed claim of 11.2 percent --
11 I should have mentioned Countrywide 7.9 percent to 12.5
12 percent -- Lehman's proposed allowed claim is well within
13 the range of all the other comparable settlements, if
14 anything toward the high end, and the trustees' proposed
15 allowed claim is many multiples greater than any of the
16 other comparable settlements. It's a complete outlier, it
17 cannot be justified as within the range of comparable
18 settlements.

19 And then the last column is basically the same idea but
20 now including non-cash consideration as part of the recovery
21 ratio. And the conclusion is basically identical because
22 there isn't that much non-cash consideration except in the
23 Countrywide settlement.

24 So Lehman's proposed allowed claim of 11.2 percent is
25 again, if you just go down the last column, well within the

1 range, toward the high end of the range of comparable
2 settlements, whereas there's no relationship whatsoever
3 between the trustees' proposed allowed claim and every case
4 that's been resolved that I consider to be comparable prior
5 to this case.

6 Q So, Professor Fischel, I'm just going to ask you a
7 couple of questions about your approach here. One question
8 is if you look at column D, expected lifetime losses. Why
9 didn't you use claim damages instead of expected lifetime
10 losses as the common denominator for all of your comparable
11 settlements?

12 A Well first of all in some of the cases there are no
13 claim damages because the settlements occur prior to the
14 time that damages are claimed or asserted.

15 But even for ongoing cases, because you don't have --
16 by definition the cases aren't resolved, so you don't know
17 what the ultimate damages are going to be so you can't
18 really use damages as a denominator because you just don't
19 have the information to do it, but lifetime losses you do
20 have the information to do it, and that's why lifetime
21 losses is typically used as a denominator for analyzing, you
22 know, comparable settlements.

23 Q Professor, so you focused on what's in columns E and F,
24 the recovery ratios. Has this approach been used by
25 analysts to analyze settlements?

1 A Yes. Because if you want to analyze a settlement, as I
2 said, it is customary and logical to analyze how a
3 settlement or proposed settlement compares with comparable
4 settlements. And the way that's typically done is by
5 analyzing the recovery ratio of what the amount that's
6 recovered in the settlement is in comparison with some
7 denominator. And as I said, since you can't really use
8 damages of frequently used denominator as lifetime losses.

9 Q Have you prepared a demonstrative that shows how
10 analysts have used the same method that you do to analyze
11 settlements?

12 A Yes.

13 Q I just want to refer, Professor Fischel and the Court,
14 to plan Administrator Exhibit 779. This is also tab 7 in
15 your binder, Professor Fischel. Is this the demonstrative
16 that you compiled?

17 A Yes. This is just excerpts from a number of different
18 analyst reports basically analyzing settlements relative to
19 comparable settlements in exactly the way that I did, and a
20 number of them again talk about what the consideration
21 received is relative to expected lifetime losses.

22 The most detailed one is the Morgan Stanley one in the
23 bottom of the exhibit, and again, you see Citi, J.P. Morgan,
24 and Bank of America compared against each other, because
25 again, as I concluded those are comparable. And then you

1 see what -- a series of entries for the announcement date,
2 the number of trusts, the original collateral balance, the
3 settlement amount, the settlement amount as a percentage of
4 the original balance, and then the settlement amount as a
5 percentage of the realized and future estimated losses, and
6 a final column realized and future losses as a percentage of
7 original collateral balance.

8 So again, the methodology that I used is, you know, I
9 would say standard, widely accepted, and routinely commented
10 upon and analyzed in a similar way to the way that I do by
11 sophisticated market participants, investment analysts, et
12 cetera.

13 Q And for the record this is -- what's reflected in this
14 demonstrative Plan Administrator Exhibit 779 are Plan
15 Administrator Exhibits 432, 433, and 444. And again, as you
16 testified that's Credit Suisse, Deutsche Bank, and Morgan
17 Stanley using the similar approach on recovery ratios.

18 A Correct.

19 Q Okay. Professor Fischel, is there a difference between
20 bankruptcy and non-bankruptcy cases in how you measure the
21 consideration received?

22 A Yes, some difference. Again, I eluded to it before,
23 because in bankruptcy cases what's --

24 MR. COSENZA: You want to put up Plan
25 Administrator 778?

1 THE WITNESS: Yeah. In bankruptcy cases you don't
2 have a determination of the ultimate consideration, you have
3 a determination of the allowed claim, and so that
4 substitutes for the consideration received when you're
5 dealing with bankruptcy cases.

6 BY MR. COSENZA:

7 Q Professor Fischel --

8 THE COURT: Can I ask a clarifying question?

9 THE WITNESS: Sure.

10 THE COURT: Do you mean that you treat the cash
11 consideration as if it were 100 percent actual dollar money?
12 So in Rescap, for example, where you have a \$7.3 million of
13 cash consideration, does that represent the actual
14 distribution or the allowed amount, the notional amount --
15 allowed amount of the claim?

16 THE WITNESS: The latter, Your Honor, not the
17 ultimate cash received.

18 THE COURT: The allowed amount of the claim.

19 THE WITNESS: Correct.

20 THE COURT: So as if it were not in bankruptcy and
21 you were getting paid in real cash dollars.

22 THE WITNESS: Correct, but recognizing that --
23 just as in this case that that's not the case, that both the
24 allowed claim of Lehman and the trustees are disputed
25 allowed claim for Your Honor to resolve, but the amount of

1 cash will be determined at some later point in time.

2 THE COURT: Thank you.

3 BY MR. COSENZA:

4 Q So, Professor Fischel, moving back to column D here,
5 you talked about expected lifetime losses. Just going
6 through how you actually calculated that. How'd you
7 estimate lifetime losses for settlements of comparable
8 claims?

9 A Well in the previous cases there was already a
10 determination or a calculation so we just used that.

11 You know, for this case --

12 Q Yes, how'd you do it for this case?

13 A Lifetime losses consist of realized losses that have
14 occurred to date as well as expected future losses, and the
15 sum of the two is -- results in expected lifetime losses,
16 and we had separate calculations for both the realized
17 losses to date and expected future losses.

18 Q The sort of realized loss that you used, how'd you get
19 to that number for the losses in this case?

20 A Well in this case there were detailed calculations of
21 realized losses by one of the trustees' experts, a Dr. Snow,
22 so we just used that number. We did some checking and we
23 had no disagreement with the calculations of Dr. Snow, so we
24 just used that number. Some minor instances where we needed
25 some additional data so we used data from a data vendor or

1 the servicer, but primarily we used data from Dr. Snow. And
2 for future losses we used data that we got from a data
3 vendor by the name of Andrew Davidson.

4 Q Are you aware if there's a dispute in this estimation
5 proceeding about the reliability of Andrew Davidson?

6 A I am.

7 Q Okay. Given that why did you use the Andrew Davidson's
8 software for -- to calculate future losses -- or estimate
9 future losses?

10 A Well we have used Andrew Davidson some times in the
11 past, particularly for relatively minor disputes because
12 it's quite inexpensive as compared with the others, but
13 given the dispute we tried to avoid it in this case and we
14 contacted another data vendor that we've done a lot of
15 business with, CoreLogic, but they would not give us a
16 license. So we wanted to avoid the dispute and use a
17 different data vendor, but we weren't able to do so.

18 Q Why were you not able to use CoreLogic or get a license
19 from CoreLogic to use that model or their software for this
20 proceeding?

21 A We were told they did not want to license their data in
22 a proceeding where the position that Lehman was advancing
23 was adverse to some of their major bank clients.

24 Q In your opinion does your use of Andrew Davidson's
25 software for the purpose you used it here undermine the

1 reliability of your results?

2 A No.

3 Q Why not?

4 A Because we weren't using Andrew Davidson's software to
5 value loans, we were using it to estimate future losses in a
6 situation where the vast majority of the losses have already
7 been realized, and as I said, there was no dispute about the
8 amount of the realized losses, I think approximately 85
9 percent of the expected lifetime losses have already been
10 realized, only about 15 percent are -- consist of expected
11 future losses, and again, we're dealing with ranges of
12 settlement values.

13 So even if CoreLogic or another data vendor were more
14 precise than Andrew Davidson in one direction or another it
15 wouldn't change the qualitative nature of our results, even
16 though as I said, we would have preferred to use, given the
17 dispute, preferred to use a different data vendor if we
18 could.

19 Q Professor Fischel, on to -- looking at the settlements
20 themselves that are referenced in Plan Administrator Exhibit
21 778, did you consider differences between the factors
22 present in this case and these other settlements that you
23 analyzed?

24 A Yes. As I've said, no cases are identical, and
25 therefore it was important to identify a series of factors

1 which we tried to do that would, you know, basically cut in
2 one direction or another, that would tend to make resolution
3 in this case higher than the comparable settlements of lower
4 than the comparable settlements, depending on what the
5 factor was.

6 Q Proffer Fischel, I'm going to direct you to tab 8 in
7 your binder, it's Plan Administrator Exhibit 788. Is this a
8 demonstrative that you prepared?

9 A Yes.

10 Q Could you walk the Court through it as to the
11 illustrative factors relevant to different settlements and
12 the size of settlement payments?

13 A Yes. So there's three categories of factors here.

14 The first being factors likely to increase the size of
15 the settlement payment. Meaning when those factors are
16 present all else equal the settlement payment should be
17 higher.

18 And then the second category is the reverse. When
19 those factors are present the settlement payment should be
20 lower.

21 And the third category is factors which you can't tell
22 on their face whether they cut in one direction or another,
23 you have to analyze them.

24 And so I can walk through --

25 Q Yeah, why don't you walk through each factor,

1 Professor, starting with the factors that you thought were
2 likely to increase the size of the settlement payment.

3 A Okay. So the first is whether additional claims such
4 as servicing claims are being released. And again, the more
5 claims that are being released typically you have to pay for
6 that because you relinquish the ability to bring an
7 additional proceeding to seek additional recovery. So in
8 most of the comparable settlements servicing claims were
9 released. My understanding is in the context of this
10 proceeding servicing claims have not been released.

11 Second, availability of prejudgment interest. Again,
12 when prejudgment interest is available it increases the size
13 of any potential recovery, so therefore when it's available
14 you expect settlements to be higher as a result.

15 Q Uh-huh.

16 A Again, my understanding is that prejudgment interest
17 was available at least in the non-bankruptcy comparable
18 settlements, not available, at least my understanding, under
19 the relevant bankruptcy laws as would be applied in this
20 proceeding.

21 Third factor, which is quite important, the incentives
22 of the defendant to settle that go beyond avoiding the costs
23 of litigation such as avoiding adverse publicity.

24 For ongoing businesses there's frequently a concern
25 about adverse publicity, distraction of time and effort of

1 key employees, just a general desire not to be -- not to
2 have the ongoing business compromised in any way by a major
3 collateral proceeding and therefore a desire to end it. And
4 when there is that desire for an ongoing business with an
5 ongoing business to avoid the collateral affects of ongoing
6 litigation, again, you have to pay for that, so when that
7 factor is present you would expect settlements to be higher.

8 For a situation like Lehman, which is no longer an
9 ongoing business, that factor is less important than it
10 would be again for the non-bankruptcy comparable
11 settlements. Again we -- in my report we reflected some of
12 the quotes, some of the considerations that existed for non-
13 bankruptcy settlements.

14 So the second category is factors likely to reduce the
15 size of the settlement payment.

16 First obviously non-cash consideration, to the extent
17 that non-cash consideration exists. It's a substitute for
18 cash, so it would intend to reduce the cash size portion of
19 the settlement payment.

20 Second is legal impediments to pursuing the claim.
21 Actually the second and the third bullet point are quite
22 similar. Third bullet point being statute of limitations,
23 the second bullet point is if there's an issue of whether
24 there's a significant fraction of certificate holders who
25 are willing to support and indemnify the trustee to pursue a

1 claim to the extent there's uncertainty about whether claims
2 will be barred by the statute of limitations or whether
3 there'll be sufficient support to indemnify the trustee.
4 Again, to the extent those factors are present they would
5 tend to reduce the size of the settlement payment.

6 Those factors did exist in a number of the comparable
7 settlements. As far as I know they do not exist in the
8 contest of this estimation proceeding, so those factors
9 would suggest all else equal that the Lehman proposed
10 allowed claim would be higher than the results of the
11 comparable settlements.

12 And again, the last factor, again, I think fairly self-
13 explanatory. To the extent that a defendant cannot pay a
14 cash judgment, that was a big factor, for example, at
15 Countrywide, that would tend to depress the size of a
16 settlement payment. Again, for bankruptcy cases where
17 you're dealing with allowed claims as opposed to cash
18 recovery, not so much a factor, not a factor. And so when
19 that factor is present all else equal that would tend to
20 depress the size of a settlement relative to the Lehman
21 settlement.

22 So the first two categories sort of cut in opposite
23 directions. Some of them suggest that the Lehman proposed
24 allowed claim should be higher than the results of the
25 comparable settlements, and other factors suggest the

1 opposite.

2 The last category --

3 THE COURT: Can I -- before you get to the --

4 THE WITNESS: Sure.

5 THE COURT: -- last category. Is it your opinion
6 that -- is this a qualitative or impressionistic analysis or
7 is this something that I could tie in statistically
8 significant ways if I look at the comparable settlements?

9 Stated differently. When I look at, for example,
10 Plan Administrator Exhibit 781, which is at tab 9, which
11 reflects the comparison of the percentages for these various
12 settlements, are these -- am I seeing statistically
13 significant differences say, for example, between the
14 Countrywide 12.5 and the Citigroup 8.3? And similarly, have
15 you applied the factors in ways that you could tell me
16 reflect statistical significance?

17 THE WITNESS: I'm --

18 THE COURT: And if that's not a good question tell
19 me how to ask a better one.

20 THE WITNESS: No, no, no, it's a perfectly good
21 question, and I don't want to imply --

22 THE COURT: And to Mr. Goldberg I'll say I'm not
23 intentionally trying to or meaning to expand the scope of
24 the opinion. So --

25 THE WITNESS: I don't want to imply, you know, a

1 false precision to the Court. All the factors that I've
2 discussed so far are qualitative in nature, but they're also
3 empirically based. Meaning that in the context of the
4 comparable settlements these factors were real, were given
5 as reasons for either increasing the size of the settlement
6 or decreasing the size of the settlement.

7 The last thing that I'm going to discuss, the
8 ambiguous factors, that was the subject of a very detailed
9 statistical analysis that's described in my report that I'll
10 describe in a minute.

11 But the first two groups, there's really no
12 quantify indication associated with those, it's just
13 balancing things that cut in different directions.

14 THE COURT: Thank you.

15 BY MR. COSENZA:

16 Q So, Professor Fischel, previewing for us, do you want
17 to talk about the analysis you did for the factor that has
18 an ambiguous effect, and that's the difference between --

19 THE COURT: Mr. Cosenza, before you get into that
20 it is approaching an hour and 20 minutes. What do you think
21 in terms of a break?

22 MR. COSENZA: Sure. We can take a break know,
23 Your Honor.

24 THE COURT: Okay.

25 MR. COSENZA: That would be perfect.

1 THE COURT: Why don't we do that since you're
2 about to turn to that topic. And why don't we say we'll
3 resume at 11:30.

4 Professor Fischel, while you are with us giving
5 testimony please do not discuss your testimony or the case
6 with anyone during these breaks, nor be in anyone's presence
7 while they're doing the same.

8 THE WITNESS: I understand, Your Honor. Thank
9 you.

10 THE COURT: All right. Thank you. We'll come
11 back at 11:30.

12 MR. COSENZA: Thank you, Your Honor.

13 (Recessed at 11:17 a.m.; reconvened at 11:34 a.m.)

14 THE COURT: Have a seat, please.

15 MR. COSENZA: So, Your Honor, I may continue on?

16 THE COURT: Yes.

17 MR. GOLDBERG: Your Honor, may we approach?

18 THE COURT: Yes.

19 (Sidebar off the record)

20 THE COURT: Okay. Mr. Goldberg?

21 MR. GOLDBERG: Your Honor, the trustees just would
22 like to lodge their objection on the record to the testimony
23 of Professor Fischel concerning the institutional investors'
24 views as to what is a fair and reasonable settlement and in
25 order to persuade Your Honor as to the amount at which you

1 should estimate the trustees' claims.

2 THE COURT: Thank you. Your objection is noted.

3 Go ahead, Mr. Cosenza.

4 MR. COSENZA: Okay.

5 BY MR. COSENZA:

6 Q Professor Fischel, before we left for a break we were
7 talking about I think the factors which have ambiguous
8 effects, and there was a question from the Court as to the
9 statistical analysis you had done as part of the last bullet
10 here, the difference in the underlying loans.

11 Just want to describe the analysis that was done by you
12 and your team to understand the differences in the loan
13 periods between this case and the loans at issue for Lehman
14 as opposed to the other comparable settlements that we've
15 discussed earlier?

16 A Yes. The third category, the factors that have
17 ambiguous effects refers to the quality of loans. And the
18 reason why that has an ambiguous effect is unlike the other
19 factors, which as I told the Court, even though you can't
20 quantify them you know which direction they cut relative to
21 the differences between the Lehman -- the proposed allowed
22 claims in this matter and the comparable settlements.

23 With respect to the quality of the loans there are
24 really two differences. One is you can't say just
25 identifying the factor which direction it cuts. And the

1 second way which it's different is that it is possible to,
2 in response to the Court's question, analyze statistically
3 any differences between the quality of the loans at issue in
4 this matter versus the comparable settlements by analyzing
5 whether the loans at issue in this case were more or less
6 likely to default than the loans at issue in the comparable
7 settlements.

8 And that is a question that can be analyzed in a
9 rigorous way, in a statistical way, not just to analyze
10 whether loans are more or less likely to default, but also
11 to analyze whether the differences are large enough to be
12 statistically significant. And that is exactly what we did.
13 It's discussed at length in my report, the results presented
14 in I think it was Exhibit G --

15 Q Correct.

16 A -- of my report.

17 In the answer, and again why it's listed as an
18 ambiguous effect, is that there is no clear pattern. We
19 measured the likelihood of default of the Lehman loans
20 versus the other loans in the different comparable
21 settlements over two different time periods, through 2009 as
22 suggested by some of the academic literature that I describe
23 in my report, and through 2017 as close to the present time
24 as we could get data for. And with respect to some of the
25 comparable settlements and some of the time periods the

1 Lehman loans were less likely to default, therefore better,
2 you'd expect the proposed allowed claim to be lower. And in
3 other situations -- in other comparisons in other time
4 periods they were more likely to default.

5 So the results are ambiguous, but ambiguous in a way
6 that is the result of a precise and detailed statistical
7 analysis, which as I said, it's discussed at length in my
8 report and the results are summarized in Exhibit G of my
9 original report.

10 Q So just to be clear on the record, Professor, if you
11 look at tab 1 of the binder I handed you, I think you
12 referenced Exhibit G, which is a table that compares default
13 rates between loans and comparable settlements and covered
14 loans in the participating trust, this is the detailed
15 analysis you were referring to --

16 A Yes.

17 Q -- in your prior testimony?

18 A That's right.

19 Q Thank you.

20 So, Professor, you went through these factors, likely
21 to increase the rate, factors likely to reduce the size, and
22 factors that had ambiguous effects. What did you conclude
23 from applying these factors to the Lehman matter or the plan
24 administrator's matter for Lehman as opposed to the
25 comparable settlements you analyzed?

1 A That there was no reason why the proposed claim in this
2 case should be outside the range of the outcomes of
3 comparable settlements in the what I call the non-
4 quantifiable, non-statistical factors, you have a balance of
5 factors that cut in one direction, factors that cut in the
6 opposite direction.

7 And with respect to the quality of the loans, the
8 factor that can be identified and analyzed in a precise and
9 statistically rigorous fashion you get basically the same
10 result that you can't say one way or another that the
11 proposed allowed claim -- or the ultimate allowed claim in
12 Lehman should be in any way outside the range of comparable
13 settlements.

14 So the conclusion that I reached that the Lehman's
15 proposed allowed claim was well within the range if anything
16 towards the higher end of the range of comparable
17 settlements while the trustees' allowed claim was far
18 outside the range of comparable settlements that I have even
19 more confidence in that conclusion taking into account the
20 factors that I could identify that effect whether a
21 particular outcome in this matter should be higher or lower
22 than other comparable settlements.

23 Q Professor Fischel, did you assist in putting together a
24 demonstrative that compares Lehman's and the trustees'
25 proposed allowed claims with the recent settlements?

1 A Yes.

2 Q Okay. I just want to refer you to tab 9 in your
3 binder. That's Plan Administrator's 7 -- Exhibit 781. Is
4 this the demonstrative that you assisted in putting
5 together?

6 A Yes. This is basically a shorthand version of the more
7 detailed version that I described earlier, but it captures
8 the essence of it. And again, it shows exactly what I've
9 said several times now, is that the Lehman proposed allowed
10 claim in this matter is well within the range if anything
11 towards the higher end of the range of comparable
12 settlements, and the trustees' proposed claim is far outside
13 the range without any basis or justification in any of the
14 comparable settlements.

15 Q Professor Fischel, the counsel for the trustees has
16 argued that the comparison of the recovery ratios between
17 the Lehman matter and these comparable settlements is
18 invalid because here there was a loan review done that
19 justifies the trustees' higher proposed allowed claim. Do
20 you agree with that?

21 A No, I don't.

22 Q Why not?

23 A For two reasons.

24 First of all some of the comparable settlements did
25 have loan reviews, sometimes based on sampling as opposed to

1 complete loan reviews, but they did have loan reviews.

2 But the more fundamental reason is in situations where
3 parties look at the same loan files and reach radically
4 different conclusions where one side says virtually ever
5 loan file contains a material breach and the other side says
6 a much lower percentage of files contain a material breach,
7 that difference doesn't resolve anything, and therefore
8 short of a trial, which without sampling in some cases could
9 take years, it's not clear and it wasn't clear in the
10 previous matters that I've been involved in, that loan file
11 reviews where there's such disparate opinions about the
12 results of loan file reviews because so much subjective
13 judgment is required really contribute one way or another to
14 making a settlement higher or lower.

15 Q Just to be clear, so in the J.P. Morgan and WAMU
16 matters that you worked on previously there were loan level
17 reviews done?

18 A Yes, there was. Yeah, and they had the characteristics
19 that I just described, and the parties just had radically
20 different contentions about what the loan file reviews
21 showed.

22 Q And the same thing in Citi, you also analyzed the
23 Citigroup settlement --

24 A That's right.

25 Q -- those were also loan level reviews?

1 A There were loan level reviews there as well.

2 Q Thank you.

3 Other than -- now we've gone through your two, we want
4 to go back to the initial slide, Plan Administrator Exhibit
5 774, the two summaries of your opinions.

6 Other than these two opinions that you described here,
7 is there anything else that supports your work in this
8 matter, Professor Fischel?

9 A Yes. Subsequent to the filing of my report but prior
10 to my deposition I learned of the outcome of what occurred
11 with certain what I think is referred to collapsed trusts
12 where claims by an outside appraiser I think in -- I think
13 there was six if I remember collectively -- in five of the
14 six the claims were valued at the level of the -- of
15 Lehman's proposed allowed claim, and in the sixth the claims
16 are valued at a much lower value, a fraction of Lehman's
17 proposed allowed claim, and obviously therefore a much lower
18 fraction of the trustees' proposed allowed claim.

19 And again, I would say this, again, it's just
20 consistent with the other evidence that I've reviewed of the
21 different pieces of data all support the Lehman's proposed
22 allowed claim in this matter and all are fundamentally
23 inconsistent with the trustees' proposed allowed claim in
24 this matter.

25 MR. COSENZA: Your Honor, I believe I've concluded

1 my direct of Professor Fischel.

2 THE COURT: Okay. Very good. Thank you,
3 Mr. Cosenza.

4 MR. COSENZA: Thank you.

5 Mr. Goldberg, are you ready start now or did you
6 want to take a break?

7 MR. GOLDBERG: No, Your Honor, I have a module
8 that I could do now.

9 THE COURT: Okay.

10 MR. GOLDBERG: I need a moment to pass around some
11 documents.

12 THE COURT: Please. Should I hold onto the direct
13 binder as well?

14 MR. GOLDBERG: Probably can't hurt.

15 THE COURT: Okay.

16 (Pause)

17 MR. GOLDBERG: So, Your Honor, what you should be
18 getting and the witness should be getting and counsel should
19 be getting are three binders of exhibits, plus separately we
20 have bond Professor Fischel's deposition transcript.

21 THE COURT: Okay. Thank you.

22 (Pause)

23 THE COURT: You're just going to show off and out
24 do Mr. Shuster, right?

25 MR. GOLDBERG: I think that's a common occurrence,

1 but I'm going to do my best today to restrain myself.

2 (Pause)

3 MR. GOLDBERG: Your Honor, may I inquire?

4 THE COURT: Please.

5 CROSS-EXAMINATION

6 BY MR. GOLDBERG:

7 Q Professor Fischel, how are you today, sir?

8 A I'm fine, sir. How are you?

9 Q I'm doing well, thank you.

10 A Good.

11 Q The judge asked if I was prepared, but are you ready to
12 go?

13 THE COURT: Do you have the binders at your -- at
14 the ready there?

15 THE WITNESS: Well I have my -- I think the
16 deposition transcript. I was told by your colleague that
17 there's no room for the binders, so if they're on the floor
18 they'll be handed to me when --

19 MR. GOLDBERG: Yes, sir. They will.

20 BY MR. GOLDBERG:

21 Q So, Professor Fischel, as part of your work generally
22 at Compass Lexecon you value assets, right?

23 A Yes, sir.

24 Q And you use models to help you in valuing your assets
25 don't you?

1 A Depending on the circumstances, but frequently, yes.

2 Q Regularly you use models to value assets in your work?

3 A Depends what kind of asset. I think you have to be a
4 little bit more specific.

5 Q So you were deposed in this matter, sir?

6 A I was.

7 Q And you took at oath to tell the truth?

8 A I did.

9 Q That's the same oath you took here today, right?

10 A Correct.

11 Q And you did that, you told the truth?

12 A I did.

13 Q Could you turn to page 40 of your deposition
14 transcript, sir?

15 A I'm sorry, what page, sir?

16 Q Forty, 4-0.

17 A Okay, I have it.

18 Q On page 40 at lines 2 to 7, were you asked the
19 following questions and did you give the following answers.
20 Question, "You have used models to value assets, correct?"
21 Answer, "Yes." Question, "You've done it regularly,
22 correct?" Answer, "Correct."

23 Were you asked those questions and did you give those
24 answers?

25 A Yes, but why don't you read question -- lines 8 and 9,

1 which I think is exactly what I just said.

2 Q Sir, were you asked those questions and did you give
3 those answers?

4 A Yes, but as I said, it's exactly what I just said,
5 particularly if you read lines 8 and 9.

6 Q My question --

7 THE COURT: So, Professor Fischel, you know -- I
8 know you know how this works because you've testified --

9 THE WITNESS: Right.

10 THE COURT: -- frequently, so Counsel is entitled
11 to attempt to impeach you, Mr. Cosenza will -- is absolutely
12 free to ask you questions on redirect.

13 THE WITNESS: I apologize, Your Honor.

14 THE COURT: No need to apologize. Just in the
15 interest of being able to move this along I just thought I'd
16 make that observation.

17 THE WITNESS: Thank you.

18 THE COURT: Go ahead, Mr. Goldberg.

19 MR. GOLDBERG: Thank you, Your Honor.

20 BY MR. GOLDBERG:

21 Q Professor, I don't mean to suggest that you've never
22 done a valuation without using a model. The point of my
23 question is, using models is something you do in the regular
24 course of your business when you value assets, correct?

25 A Depending on the circumstances, correct.

1 Q And you're familiar with something called the loan
2 dynamics model?

3 A You know, somewhat familiar, not I would say,
4 intimately familiar.

5 Q Do you understand that it's part of what's -- what are
6 called the Andrew Davidson models?

7 A Yes, I am familiar with that.

8 Q Okay. And if you hear the phrase ADCO will you
9 understand that to mean the Andrew Davidson company?

10 A Yes, sir.

11 Q You've heard that before?

12 A Yes, I have.

13 Q And so now you understand that the loan dynamics model
14 is an ADCO model, yes?

15 A I understood that already. Thanks.

16 Q Okay. And before this case you have used ADCO models,
17 right?

18 A Yes, sir.

19 Q And in fact your company, Compass Lexecon, has a lot of
20 experience using the ADCO models in other matters unrelated
21 to this; isn't that right, sir?

22 A That's right.

23 Q And you found the Andrew Davidson models to be
24 reliable, right?

25 A Yes.

1 Q And you found it to be reliable for the work that you
2 did here?

3 A Reliable enough for purposes of being confident in our
4 conclusions, correct.

5 Q The purpose for which you used the model in this case
6 it was reliable; is that right?

7 A Yes.

8 Q And the purpose that you used it for was to estimate
9 future losses on non-liquidated loans; is that right?

10 A That's right.

11 Q Now, do you remember from your deposition we talked a
12 little bit about tuning a model?

13 A I do.

14 Q And you know what tuning a model means, right?

15 A I do.

16 Q It means that the user can alter inputs if the user so
17 desires?

18 A That's a little bit too general a description for my
19 understanding of what it means.

20 Q Why don't you give me your understanding as to what you
21 think it means to tune a model.

22 A That when a model is dated one way to at least try and
23 bring it current is to alter the coefficient so that the
24 coefficients bear a closer relationship to the current
25 reality than what was originally analyzed at the time the

1 model was created.

2 Q And with that understanding in mind you're aware that
3 the Andrew Davidson model can be tuned by the user, correct?

4 A Yes, I am aware of that.

5 Q And that's for a variety of reasons, right? Like for
6 instance in the user disagrees with the default settings
7 that are in the Andrew Davidson model, right?

8 A I assume that's correct. I don't really have
9 experience or expertise in the circumstances under which the
10 model can be tuned.

11 Q So I hate to do this to you, sir, but can we go to page
12 45 of your deposition.

13 A Okay.

14 Q Starting on line 20, I'll let you get to the page. Are
15 you there, sir?

16 A Yes, I have it.

17 Q Were you asked the following questions and did you give
18 the following answers. Again, beginning on page 45, line
19 20. Question, "And are you ware that with respect to Andrew
20 Davidson models the tuner can change the model settings?"

21 Answer, "I am aware of that." Question, "That's for a
22 variety of reasons, including if for whatever reason the
23 user disagrees with the default settings, right?" Answer,
24 "I believe that's correct."

25 You were asked those questions and you gave those

1 answers, sir?

2 A I did.

3 Q Now, the flexibility or ability to tune the model,
4 that's actually a benefit to the user if the user disagrees
5 with the default settings, right?

6 A To the extent it makes the model more accurate, yes,
7 that would be a benefit.

8 Q Right. So if for whatever reason the user felt that
9 the default settings would produce an inaccurate result the
10 Andrew Davidson models allow the user to change those
11 settings to make the output reliable, right?

12 A You know, as I said, just as in my answer I believe so,
13 I'm not really an expert in the tuning of the model, but
14 certainly that would be the purpose of the tuning.

15 Q Certainly the ability to tune the model if the user
16 disagrees with the default, that's not a detriment of the
17 model, right?

18 A Would not be a detriment of the model.

19 Q And if the -- a different expert from a plan
20 administrator were to testify that the ability to tune the
21 model inherently makes the model an unreliable product you
22 would disagree with that?

23 A I think it's relative to what. So I wouldn't
24 necessarily disagree with it, no.

25 Q You wouldn't disagree with it. So just a moment ago

1 you said that it's a benefit that the user can change the
2 settings if the user believes the default settings are less
3 reliable or what you say less precise result, but if the
4 plan administrator has another expert that comes in and says
5 that exact attribute inherently makes the model unreliable
6 you wouldn't disagree with it?

7 A Well again, I don't know what another expert would say.
8 But what I meant was making a model less accurate is not the
9 same thing as making it most accurate, and it may be that
10 having a contemporary model with more accurate coefficients
11 is a superior alternative than having an old model with
12 adjusted coefficients to try and make it more contemporary.
13 That's what I meant.

14 Q I understand that, but I'm saying that the mere fact
15 that the concept of the model that it allows the user for
16 him or herself to make that determination, you agree with me
17 that's an attribute of the model, plus?

18 A To the extent I understand it, yes, I would say that's
19 an attribute of the model, and if that makes it more
20 accurate than it was previously that would be a benefit.

21 Q Now, here it was part of your work when you used the
22 Andrew Davidson models you actually did not adjust the
23 default settings, correct?

24 A Did not.

25 Q Because you found the default settings were

1 sufficiently accurate for what you were doing?

2 A For our purposes, correct.

3 Q And just to be clear, you used the loan dynamics model
4 within the Andrew Davidson models to calculate estimated
5 future losses on all liquidated loans, correct?

6 A That's correct.

7 Q Sir, one of your colleagues at Compass Lexecon is a
8 gentleman by the name of Gerry Lumer?

9 A That's right.

10 Q And Gerry Lumer is an executive vice president?

11 A Correct.

12 Q And Compass Lexecon employees about 500 people,
13 correct?

14 A In total approximately, correct.

15 Q And Dr. Lumer is a senior person at Compass Lexecon?

16 A Yes, he is.

17 Q And you believe he's competent?

18 A Yes, very competent.

19 Q And you believe he has good judgment?

20 A Yes, I do.

21 Q And you're aware that before you actually -- personal
22 you -- were engaged to be the testifying expert here that
23 Dr. Lumer reached out to a gentleman by the name of Dr. Rick
24 Elson to be an expert for the plan administrator, right?

25 A I don't think that's 100 percent correct. As I --

1 again, I wasn't involved in that, but my understanding is he
2 was trying to arrange a meeting with the -- with counsel for
3 Lehman. We don't hire people.

4 Q Oh, that's the part that you felt was -- oh, okay, fair
5 enough. The plan administrator hires the experts, that's
6 your point?

7 A Correct.

8 Q All right. But you're aware that Dr. Lumer tried to --
9 reached out to Dr. Elson for the purpose of having the plan
10 administrator hire Dr. Elson as an expert in this case? Are
11 you aware of that?

12 A I think that's too strong. For the purpose of having
13 the plan administrator consider hiring Dr. Elson I think
14 that's a fair statement.

15 Q So you think the plan administrator was looking to hire
16 Dr. Elson just not as an expert; is that what you're saying?

17 A No, I don't know who the plan administrator was
18 thinking of hiring.

19 Q Dr. Lumer, your colleague, reached out to Dr. Elson,
20 correct?

21 A Yes, that's true.

22 Q And Dr. Lumer, your colleague, was trying to persuade
23 Dr. Elson to work on this matter, right?

24 MR. COSENZA: Your Honor, objection, this is like
25 double hearsay. He the answer the question, I just --

1 THE COURT: Come on up.

2 (Sidebar off the record)

3 BY MR. GOLDBERG:

4 Q Sir, part of your opinion concerns the conduct of the
5 institutional investors?

6 A Yes, sir.

7 Q And you rely on the institutional investors' initial
8 assent to a settlement of a certain amount as part of your
9 opinion, right?

10 A Correct.

11 Q But you do understand that the institutional investors
12 when they articulated that consent -- or assent rather, the
13 trustees had not done a loan by loan review of the loans?

14 MR. COSENZA: Your Honor --

15 THE COURT: Yes, Mr. Cosenza, want to come back
16 up?

17 MR. COSENZA: Yes.

18 (Sidebar off the record)

19 THE COURT: Professor Fischel, I'm going to say
20 this to you even though undoubtedly you know it. But when
21 we have these colloquies after you say something or don't
22 say something it's not at all a reflection on anything that
23 you have said or that you haven't said, and I wouldn't want
24 you to infer that it was. This is as you can imagine lawyer
25 stuff.

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: Okay?

3 THE WITNESS: Appreciate that.

4 THE COURT: Okay. Go ahead, Mr. Goldberg. We're
5 going to try to let you get some inertia, momentum going and
6 ask more than one question.

7 MR. GOLDBERG: Thank you, Judge.

8 BY MR. GOLDBERG:

9 Q Professor, the first time that the institutional
10 investors articulated assent the trustees had not yet done a
11 loan by loan review of the loan files; is that right, sir?

12 A I don't know if that's right or wrong.

13 Q All right. Let's turn to page 229 of you deposition,
14 please. Are you there, sir?

15 A I am.

16 Q Were you asked the following question and did you give
17 the following answer. Page 229, beginning on line 13.

18 Question, "The first time that they -- referring to the
19 institutional investors -- articulated assent the trustees
20 had not yet done a loan by loan review of the loan files,
21 right?" Answer, "Yes, I think by definition that's true."

22 You were asked that question, you gave that answer,
23 yes, sir?

24 A I did.

25 Q And you actually hadn't spoken with the institutional

1 investors when you did your work in formulating your opinion
2 on this issue?

3 A Correct.

4 MR. GOLDBERG: Your Honor, I'm at a point where if
5 I start onto it it'll go a lot longer than your lunch break,
6 so maybe this is --

7 THE COURT: All right. So maybe this is a good
8 place to stop. How much would you like -- time would you
9 like, Mr. Goldberg?

10 MR. GOLDBERG: An hour is fine.

11 THE COURT: Okay. I'm a little concerned about
12 our progress making our own deadlines, so if we could keep
13 the lunch to an hour that would be great.

14 MR. GOLDBERG: Sure.

15 THE COURT: All right? So we'll come back at ten
16 minutes after 1:00.

17 You remain under oath during the lunch break,
18 Dr. -- Professor Fischel, and we'll see you in about an
19 hour.

20 THE WITNESS: Great. Thank you, Your Honor.

21 THE COURT: Thank you.

22 (Recessed at 12:09 p.m.; reconvened at 1:16 p.m.)

23 THE COURT: Please be seated.

24 MR. GOLDBERG: May I proceed?

25 THE COURT: Yes, please, Mr. Goldberg.

1 BY MR. GOLDBERG:

2 Q Good afternoon, Professor Fischel.

3 A Good afternoon.

4 Q So you -- part of your opinion is whether or not the
5 prior settlements are comparable to what the parties are
6 jousting about here in terms of what the claims should be
7 set at, right?

8 A That's correct.

9 Q But you understand that the purpose of this hearing is
10 to determine the amount of the trustee's allowed claims,
11 right?

12 A I do understand that.

13 Q Okay. And could you open your expert report for me,
14 sir? That's going to be in Binder 1 which I have already
15 put up on top for you. Oh --

16 A Oh.

17 Q -- the larger one in the corner. And if you could turn
18 to TRX-579 which is your report, sir.

19 A Okay. I have it.

20 Q I'm correct in the fact that TRX-579 is your report?

21 A Yes, sir, you are.

22 Q Okay. If you could turn to page 18, please,
23 specifically paragraph 34.

24 Are you there?

25 A Yes, sir.

1 Q The first sentence you wrote -- I'm waiting for the
2 Court to get there.

3 THE COURT: I'm there. Thank you.

4 BY MR. GOLDBERG:

5 Q You wrote:

6 "An analysis of settlements should be interpreted
7 with caution in this context because the purpose of the
8 estimation proceeding is not to determine whether a
9 particular settlement is within the range of comparable
10 settlements, but rather analysis of Lehman's and
11 trustees' proposed allowed claims."

12 You wrote that, correct?

13 A I did.

14 Q Now in your -- Mr. Cosenza showed you a demonstrative.
15 Do you have that small book in front of you, sir, the one
16 that Mr. Cosenza gave you, the one that has your
17 demonstratives?

18 A Yeah. I have it. Hold on. I have it.

19 Q If you could turn to Tab 9, sir.

20 A Okay.

21 Q And here putting aside the bottom red bar that address
22 the trustees and put aside the green bar that speaks about
23 Lehman Brothers, the others, those represent actual
24 settlements, right?

25 A Correct.

1 Q And that's obviously a situation where the plaintiffs
2 and the defendants agree to compromise the amount of the
3 plaintiffs' claim and they agreed to an amount, right?

4 A That's right.

5 Q Right. Do you understand that when the trustees are
6 asserting their claims here in this proceeding they're not
7 asserting an amount that the case should settle for.
8 They're asserting the amount of their claim that they intend
9 to prove with evidence. Do you understand that?

10 A I understand that.

11 Q So the comparison you make here that the -- when you
12 say on Tab 9 55 percent, you understand the trustees are not
13 asking for a 55 percent of lost settlement. The trustees in
14 this matter are asserting that they're going to prove actual
15 -- that they are entitled to have an allowed claim in a
16 certain amount, right?

17 A I understand that.

18 Q So comparing the trustees' 55 percent as you have on
19 this graph to what Countrywide and JPMorgan and others
20 settled for, that's a bit of an apples to orange comparison,
21 right?

22 A I don't think so for the reasons stated in the rest of
23 the paragraph that you didn't read in my report.

24 Q Oh, I understand you believe that other past
25 settlements could be relevant to evaluating what a fair

1 settlement might be here, right? That's what you're saying?

2 A I'm saying that as I think I said in my report that one
3 of the critical determinants in determining the value of the
4 settlement is what the parties believe would be the result
5 of a litigated proceeding if there were to be one, which is
6 very similar to the purpose of an estimation proceeding.

7 Q You think the purpose of an estimation proceeding is to
8 ascertain what parties would settle for as opposed to what
9 the actual value of the claims are?

10 A No. I didn't say that.

11 Q I'm -- okay. But you understand the purpose of the
12 estimation hearing is to set the value, the actual value of
13 the actual claims based on actual evidence, right?

14 A I understand that.

15 Q Which I distinct from how much a party might set --
16 agree to compromise its claim for, right?

17 A As I said -- as I said in that paragraph it's
18 different, but they're closely related.

19 Q But you think that if someone's willing to settle for
20 X, that that sort of gives you a little window into what
21 they think their claim is worth basically?

22 A Yes. I think one -- again, one of the most important
23 factors in determining the value of a settlement is what the
24 results of a litigated proceeding would be.

25 Q But you -- would you be charitable enough to agree with

1 me that most settlements don't involve the plaintiffs

2 recovering the full amount of what they would get if they

3 went to trial?

4 A Yes. Well, because the defendants don't agree that the

5 plaintiffs would recover that amount if the case were to go

6 to trial. And, again, similar to an estimation proceeding.

7 Q Well, no, but in an estimation proceeding you do

8 understand the Court is going to be called upon to make

9 actual findings and (indiscernible 1:21:40) what the value

10 is. The Court's not going to rule what the parties should

11 have agreed to in the absence of the hearing. You

12 understand that, right?

13 A You know, I hesitate to comment on what the Court is

14 going to do. But I -- I've given you my understanding of

15 what an estimation proceeding is which is consistent with

16 your description.

17 Q Okay. You understand this isn't -- you're familiar

18 with Bankruptcy Rule 9019, 9019?

19 A I might be if I saw it, but not by number.

20 Q That's the rule speaking on when the court has to

21 approve settlements. You've been an expert in 9019 motions,

22 I believe. Not that you can recall or you're just not

23 familiar with the rule?

24 A I -- I'm just not familiar with --

25 Q Fair enough.

1 A -- that number so I don't know.

2 Q Fair enough. Fair enough. So you cannot determine
3 whether any given loan breaches a representation and
4 warranty by reference to a prior settlement, right?

5 A I cannot.

6 Q And you cannot determine whether any given breach of a
7 representation and warranty has a material and adverse
8 effect on the value of the loan by reference to a prior
9 settlement, right?

10 A That's right.

11 Q Now in your report you identify what you characterize
12 as nine factors that you use to evaluate and compare and
13 contrast settlements, right?

14 A I don't remember the number, but I listed a number of
15 factors.

16 Q Let's look in your report, sir.

17 A Okay.

18 Q Again, it's TRX-579. And if you turn to page 21 of
19 your report.

20 A Okay.

21 Q And you see you have a heading, factors relevant to
22 understanding differences between the settlements and the
23 present case. Do you see that, sir?

24 A I do.

25 Q And then underneath you have paragraph 40 which you

1 wrote, "We take the following factors into consideration in
2 our analysis of the settlements." You wrote that, right?

3 A Yes, sir.

4 Q And then underneath you list factors, right?

5 A That's right.

6 Q And you list nine of them?

7 A Correct.

8 Q Now on direct and in response to a question put by
9 Judge Chapman, the only one of your factors that's actually
10 lends itself to scientific and statistical analysis is your
11 evaluation as to the quality of the loans between two
12 different trusts, right?

13 A That's correct.

14 Q And you did that analysis here?

15 A Correct.

16 Q And your conclusion is that it was inconclusive?

17 A That's right.

18 Q So you can't use that factor to help you determine
19 whether one settlement is comparable to another in this
20 case?

21 A No. I wouldn't say that. No. I think the opposite is
22 true.

23 Q You think the opposite is true? You think you can use
24 that factor to evaluate and compare and contrast
25 settlements, your comparable settlements to this case; is

1 that right?

2 A Correct, in the way that I described.

3 Q Sir, if you could open your deposition transcript?

4 A Okay.

5 Q Before I do that let me take a step back. Let me just
6 lay a foundation on something. That factor, the difference
7 in underlying loans, that's what you list as Factor 7 in
8 your report, right?

9 A I've got to get it again, but --

10 Q Yes. You should leave that open if you would, sir.

11 A All right. Hold on.

12 Q And specifically it's on page 22.

13 (Pause)

14 Q Are you there, sir?

15 A Yes, I have it.

16 Q So you agree with me your Factor 7 is the differences
17 in the underlying loans?

18 A Yes.

19 Q Okay. Can you look at your deposition, sir, page 109
20 beginning on line 14? I'll let you get there before I start
21 to read. Are you there, sir?

22 A Yes. I see that.

23 Q All right. Line 14, were you asked the following
24 question and did you give the following answer:

25 "Question: You were unable to draw conclusions as to

1 whether the settlement in this case should be higher or
2 lower or the same as the comparable settlements with
3 regard to Factor 7; is that fair?"

4 "Answer: That is fair because the results are
5 ambiguous depending on which loans and which settlement
6 they're being compared to and over what time period."

7 Were you asked that question and did you give that
8 answer?

9 A Yes.

10 Q So let's -- let's -- I want to tick through your
11 factors a little bit. Do you remember during your
12 deposition we talked a little bit, I was asking you if you
13 could tell me each of the factors, whether it would have a
14 direct or inverse relationship to the -- to its impact on
15 the value of the settlement?

16 A Yes.

17 Q So let's talk about that a little bit. Your Factor 1
18 which is that the claim's being released. I'm on page 21 of
19 your report which is TRX-579. The more claims being
20 released the higher the value of the settlement; is that
21 fair?

22 A Yes.

23 Q Let's look at your Factor 2, the non-cash
24 consideration. So the more non-cash consideration given the
25 higher the value of the settlement, right?

1 A All else equal, correct.

2 Q All else equal. Yes. For every -- thank you for that
3 clarification.

4 When we talk about the individual factors I may ask you
5 to change the parameter or factor. I'm always intending for
6 you to hold all other facts and circumstances --

7 A Yeah. In other words --

8 Q -- equal.

9 A -- if the cash is identical and -- between settlements
10 and one has additional non-cash consideration, that makes
11 that settlement higher.

12 Q Now your Factor 3 you actually have three subfactors in
13 there. Do you see that?

14 A Yes.

15 Q And your Factor 3(a) speaks to the cost of litigation,
16 right?

17 A Correct.

18 Q And avoiding the cost of litigation is something that
19 generally drives the value of the settlement down, right?

20 A You know, as I said in my deposition it's more
21 complicated than that. Frequently yes, but not always.

22 (Pause)

23 Q Sir, in your deposition could you turn to page 95,
24 please?

25 A Okay. I've got to get it again.

1 Q You should probably keep it --

2 A Hold on. I have it.

3 Q -- handy.

4 A Okay.

5 Q If you could turn to page 95, please.

6 A I have it.

7 Q Were you asked the following question and did you give
8 the following answer, beginning on line 13:

9 "Question: So the fact that a litigation could be
10 expensive to prosecute, avoiding that cost is something
11 that would drive the value of the settlement down,
12 correct?

13 "Answer: Correct."

14 Were you asked that question and did you give that
15 answer?

16 A Yes, but you keep taking things out of context and not
17 including other answers which put this answer in context,
18 like the other ones that you --

19 Q Okay. Well, let's --

20 A -- quoted.

21 Q -- look at another time you were asked a similar
22 question and see what your answer was. Let's look at page
23 156, please, of --

24 A Okay.

25 Q -- your deposition.

1 (Pause)

2 Q Are you there, sir?

3 A I am.

4 Q Were you asked the following questions and did you give
5 the following answers on page 156 starting on line 8:

6 "Question: One of your factors is the cost of
7 litigation, correct?

8 "Answer: Correct.

9 "Question: So obviously a pre-litigation settlement
10 would incur less costs than a settlement reached at
11 trial, correct?

12 "Answer: That's correct."

13 You were asked those questions and you gave those
14 answers, right?

15 A Yes, with the same caveat that I just mentioned.

16 Q And --

17 THE COURT: Mr. Goldberg, could I ask you and Mr.
18 Cosenza to come up for a --

19 MR. COSENZA: Yeah.

20 THE COURT: -- second, please?

21 MR. GOLDBERG: Sure.

22 (At sidebar off the record)

23 THE COURT: Okay. I'm sorry to interrupt you, Mr.
24 Goldberg. Go ahead.

25 MR. GOLDBERG: No problem, Your Honor.

1 MR. COSENZA: Could we -- Your Honor, in light of
2 our sidebar I want to go to page 156. I request that the --
3 for completeness we start at line 8 on 156 and we go all the
4 way down to line 22 on this -- on the cost of litigation
5 issue.

6 THE COURT: All right. Mr. Goldberg, do you want
7 to read that in?

8 MR. GOLDBERG: 156, eight to 156, 22. That ends a
9 question.

10 THE COURT: 156, eight --

11 MR. COSENZA: Yeah, eight.

12 MR. GOLDBERG: Eight to 22?

13 MR. COSENZA: Yeah, eight through 22.

14 THE COURT: Well --

15 MR. GOLDBERG: 22. I'm saying 22 is --

16 THE COURT: -- through 23.

17 MR. GOLDBERG: -- a question.

18 MR. COSENZA: 23, I'm sorry.

19 THE COURT: 23 and get the answer.

20 MR. GOLDBERG: Got it.

21 THE COURT: Okay.

22 MR. GOLDBERG: Okay. So I've read eight through
23 14. Can I -- is it acceptable if I --

24 THE COURT: Yeah. Go ahead.

25 MR. GOLDBERG: -- read 15 on?

1 THE COURT: Sure.

2 BY MR. GOLDBERG:

3 Q Were you asked the following questions and did you give
4 the following answers, sir:

5 "Question: So in that scenario at least for cost of
6 litigation purposes the settlement reached at trial
7 should receive more, correct?

8 "Answer: I'm not sure that follows either because at
9 that point the costs are sunk.

10 "Question: Do you remember earlier in the day we
11 talked about your nine factors?

12 "Answer: Uh-huh."

13 Were you asked those questions and did you give those
14 answers?

15 A Yes.

16 MR. GOLDBERG: Is that everything?

17 MR. COSENZA: Yes, for now. Yes.

18 (Pause)

19 BY MR. GOLDBERG:

20 Q So if there's an early settlement that avoids
21 litigation costs there is a discount associated with that,
22 right, a cost avoidance discount to the settlement
23 generally?

24 A Frequently, but as I discuss elsewhere in the
25 deposition not always because economizing on costs is

1 reciprocal and it's not what you're directing me to. But I
2 explain that at a different part of the deposition.

3 So sometimes there's no discount. Sometimes the
4 discount can be a premium. It just depends on the
5 circumstances even though at least in my experience
6 frequently economizing on costs is a reduction in the
7 settlement, but certainly not always and it depends on the
8 relevant facts and circumstances.

9 Q So frequent -- frequently an early settlement that
10 avoids litigation costs will result in a discount to the
11 settlement; is that right?

12 A Frequently, yes. That's -- in my experience that's
13 correct.

14 Q Now your Factor 3(b) which also appears on page 22 of
15 your report -- you should keep your deposition transcript
16 happy?

17 A It's just not so easy because --

18 Q You don't have enough room?

19 A -- there's not enough room. But I'll keep -- I'll keep
20 reaching for it. Page 23, sir?

21 Q Two, 22,

22 A 22. Okay. I have it.

23 Q Now that's -- that goes to the delays associated with
24 recovery caused by litigation, correct?

25 A Among other things, correct.

1 Q Well, that's that factor.

2 A Oh, (b) is -- 3(b) is that, correct.

3 Q Right. So -- and generally speaking the more delay, if
4 you avoid the delay that's associated with litigation that
5 will result in a discount to the settlement value, right?

6 A From the plaintiffs' perspective that's correct.

7 Q And your Factor 3(c) on page 22 where you write,
8 "requirements that a threshold fraction of the certificate
9 holders direct and indemnify the trustee to investigate
10 claims." Do you see that?

11 A I do.

12 Q As we talked about in your deposition that's the
13 requirement that trustees often impose on certificate
14 holders that the trustee requires a direction and indemnity
15 from a sufficient number of holders, right?

16 A That's correct.

17 Q And in some cases there are questions as to whether
18 there will be sufficient certificate holder support to be
19 able to provide the requisite direction and indemnity,
20 right?

21 A That's correct.

22 Q And in those cases, in those circumstances where there
23 are questions as to whether certificate holders will be able
24 to provide a direction and indemnity, that's a factor that
25 drives the value of a settlement down, right?

1 A Correct.

2 Q Now your Factor 4 on page 22 where you write, legal
3 impediments to the plaintiffs' pursuit of claims, do you see
4 that?

5 A I do.

6 Q That's -- generally you're speaking about if there are
7 significant legal defenses, right?

8 A Correct.

9 Q And as is not unusual in the RMBS put back
10 circumstances there's -- sometimes there are issues of
11 statutes of limitations, right?

12 A That's right.

13 Q And the presence of a potentially bona fide statute of
14 limitations defense, that has the impact of driving the
15 value of a settlement down, right?

16 A That's correct.

17 Q Now your Factor 5, that factor is the bill -- ability
18 of the potential defendant to pay a cash judgment; is that
19 right?

20 A Yes.

21 Q And you agree with me that at least as applied here
22 that factor should be giving minimal or no weight because
23 we're talking about Lehman who already is in bankruptcy,
24 right?

25 A Correct.

1 Q And your Factor 6, the differences in governing legal
2 issues and standards, that factor is not relevant to your --
3 well, withdrawn. Let me take a step back.

4 You're aware that the trustees have their own expert
5 who has proffered examples of settlements that it believes
6 are comparable, right?

7 A I'm aware of that.

8 Q And your Factor 6, the differences in governing legal
9 standards, that factor is not relevant to your disagreement
10 with the trustees' expert, right?

11 A I don't think that's correct.

12 Q You don't think that's correct.

13 (Pause)

14 Q If you could open your deposition, sir.

15 A Okay. I have it.

16 Q Could you turn to page 105, please?

17 A Okay.

18 Q Were you asked the following question and did you give
19 the following answer, page 105, starting on line 12:

20 "Question: So your Factor 6 is not relevant to your
21 potential disagreement with Mr. Finkel over what an
22 appropriate comparable settlement might be?

23 "Answer: That's right."

24 Were you asked that question and did you give that
25 answer?

1 MR. COSENZA: Your Honor, I --

2 THE COURT: Mr. Cosenza, why don't you folks come
3 up again?

4 MR. COSENZA: Yeah.

5 (At sidebar off the record)

6 BY MR. GOLDBERG:

7 Q Professor, were you asked that question and did you
8 give that answer?

9 A I did, but again it's misleading because if you look at
10 my report there's a detailed discussion of the differences
11 between legal standards that distinguish some of the cases
12 that the -- one of the trustees' experts, Mr. Aronoff has
13 cited. So I think your question, because it's incomplete,
14 leaves a very misleading impression.

15 Q Well, your -- you are aware that Mr. Finkel has
16 provided other settlements that he -- that the trustees
17 assert are comparable settlements, right?

18 A My differences with Mr. Finkel are not about different
19 legal standards. My differences with Mr. Aronoff are about
20 different legal standards and I don't want to give a
21 misleading answer by not providing the context in which my
22 report was written.

23 Q I didn't ask you about Mr. Aronoff. I asked you very
24 specifically that I -- and even before I went to the
25 transcript, sir, I asked you if you're aware that the

1 trustees proffered an expert who provided other comparable
2 settlements. And you're aware of that, right?

3 A There's multiple trustee experts and I was talking
4 about one in my report and apparently you're talking about
5 another one.

6 Q You're under the impression that Mr. Aronoff has
7 provided comparable settlements in his expert report?

8 A Mr. Aronoff criticized my choice of comparable
9 settlements by --

10 Q I see.

11 A -- pointing to two other examples which he thought
12 justified choosing different --

13 Q Okay.

14 A -- breach rates, and I pointed out that those are based
15 on completely different legal standards. So, again, I don't
16 want my answer to be misleading because your question is
17 incomplete.

18 Q Okay. I'm speaking about Mr. Finkel right now. You're
19 aware that he, as part of his report, laid out other
20 settlements that he -- that the trustees contend are
21 comparable. You're aware of that?

22 A I am aware of that.

23 Q And with respect to your disagreement with Mr. Finkel
24 over which settlements are comparable and which are not,
25 your Factor 6 is not relevant to that disagreement, right?

1 A Not relevant to that disagreement, correct.

2 Q And your Factor 7 on page 22 which we've already talked
3 about is that the differences in the underlying loans, you
4 view that factor, that's -- your conclusion is inconclusive
5 in terms of comparing settlements, right?

6 A I'm sorry. Page 22, sir?

7 Q Page 22 of your report.

8 A Okay.

9 Q It's the differences in underlying loans. It's the
10 issue we spoke about previously.

11 A Yes. It's inconclusive in the sense that it does not
12 establish that the Lehman loans were either consistently
13 better or consistently worse than the loans at issue in the
14 comparable settlements.

15 Q All right. So you can draw no conclusions as to
16 whether a reasonable settlement here would be higher, lower
17 or the same based on that factor alone?

18 A I don't agree. That's what you asked me before. What
19 that suggests to me is that there's no reason because
20 there's no systematic difference between the loans at issue
21 here and the loans at issue in the comparable settlements to
22 believe that because of that factor a settlement value in
23 this case should be outside the range of the other
24 comparable settlements.

25 (Pause)

1 Q Sir, all I'm saying is that you were unable to draw
2 conclusions based on your Factor 7, right? It's
3 inconclusive.

4 A It's inconclusive in the way that I described.

5 Q Yes.

6 A Correct.

7 Q Okay. I accept that.

8 Now your Factor 8, the time period of the settlement,
9 again, you can -- you draw no conclusions here based on this
10 factor as to whether the claims in this case are worth more,
11 less or the same as the claims in your comparable
12 settlements?

13 A That's correct.

14 Q And your Factor 9, incentives of a defendant to settle,
15 I appreciate you say that that factor isn't present here
16 because Lehman is no longer operating, right?

17 A Correct.

18 Q But you did no work to actually quantify the impact of
19 that factor, right?

20 A I didn't and I don't know how it would be possible to
21 quantify that.

22 Q And -- but you didn't?

23 A I did not.

24 Q Now when you looked at -- when you're evaluating
25 comparable settlements and you look at each of the nine

1 factors that we've just talked about, you look at each of
2 those factors independently and you do basically a binary
3 analysis as to whether the factor as applied either has an
4 increasing or decreasing effect on the settlement, right?

5 A Or you can't tell. Correct.

6 Q Or you can't tell. So one of your comparables in your
7 report was a Lehman securities' class action case, right?

8 A That's right.

9 Q But that doesn't appear in the demonstrative that's in
10 Tab 9 that Mr. Cosenza showed you?

11 A It does not.

12 Q And so you're not being asked to testify here as to
13 that case as a comparable?

14 A Unless I'm asked, correct.

15 Q You haven't been?

16 A Correct.

17 Q Now as to the Rescap settlement, you actually concluded
18 that the Rescap settlement is of limited value to assessing
19 the claims here, right?

20 A Relatively speaking, correct?

21 Q So you agree with me that the best comparables you have
22 are Countrywide, JPM, Citigroup and WAMU, isn't that right?

23 A Correct.

24 Q So let's focus on those for a little bit.

25 A Okay.

1 Q One of your bases for concluding that the Countrywide
2 settlement -- withdrawn. Sorry about that. Sorry about
3 that.

4 In Countrywide there was, in fact, non-cash
5 consideration
6 to the trustees, right?

7 A That's correct.

8 Q And that was above and beyond the cash payment?

9 A That's right.

10 Q And so that had the impact, all else being equal, you
11 would consider the non-cash factors to mean that the
12 trustees should get a little bit of a bump here because
13 they're not getting non-cash consideration, right, all else
14 being equal?

15 A All else equal it's a reason why the Countrywide
16 settlement would be higher than the proposed allowed claim
17 in this case or the ultimate allowed claim in this case.

18 Q Well, when you say should be higher you mean they
19 actually were paid more. It's not --

20 A Correct.

21 Q -- just saying it's valued higher.

22 A Yes. I'm saying they were paid more. Correct.

23 Q And as to your -- the cost avoidance factor, your
24 factor 3(a) that we talked about, Countrywide was a pre-
25 litigation settlement, right?

1 A Correct.

2 Q So Countrywide had that cost avoidance discount applied
3 to them, right?

4 A Well, you know, as I said the cost avoidance issue is
5 complicated both because you can't tell which way the cost
6 cut in every single case and also because the costs are no
7 longer an issue at the time of the negotiation.

8 Q But in Countrywide do you agree with me that there was
9 a cost avoidance discount applied?

10 A No, I don't. I mean --

11 Q You don't?

12 A -- it's possible, but I could not say unequivocally.

13 Q So let's put it this way. There's no cost avoidance
14 discount in this case here because we're having this
15 hearing, right?

16 A I guess you could say that.

17 (Pause)

18 Q Now also in Countrywide the trustee avoided the cost of
19 having to do a loan by loan file review, right?

20 A A complete loan by loan file review, correct.

21 Q And that was a factor that drove down the value of the
22 settlement in that case?

23 A You know, again, it -- it's hard to say unequivocally
24 because it would depend on what a complete loan file reveal
25 would -- loan file review would show.

1 Q Well, that's talking about the quality of the loans and
2 so forth. I'm just saying the fact that the trustees
3 avoided having to extend the cost of doing the loan file
4 review, that's a cost avoidance is something that typically
5 from the plaintiffs' perspective drives the value of the
6 settlement down, right, typically?

7 A From the plaintiffs' perspective, yes. From the
8 defendants' perspective the opposite. And how those two
9 interact, again, just depends on the relevant facts and
10 circumstances.

11 Q As your Factor 3(b), avoiding the delay, that factor
12 was present in Countrywide, right?

13 A Yes.

14 Q And that drove the value of the settlement down, right?

15 A From the plaintiffs' perspective certainly, yes.

16 Q And obviously that's a -- that delay avoidance is not
17 at play here because we've had the -- we've incurred the
18 delay?

19 A Correct.

20 Q Now the concern, your Factor 3(c) the concern about
21 having sufficient certificate holders' support in order to
22 be able to maintain the litigation, that was a factor and a
23 concern in Countrywide, right?

24 A Correct.

25 Q And that drove the value of the settlement down?

1 A Yes.

2 Q And that's not at play here?

3 A Correct.

4 Q Now you actually -- I know you say your Factor 7 is
5 inconclusive overall, but at least as to the Countrywide
6 settlement you actually were able to conclude that the loans
7 in Countrywide were less likely to default, right?

8 A Based on my statistical analysis, correct.

9 Q And because the loans were less likely to default that
10 meant that the settlement value in Countrywide would have
11 been lower?

12 A That's right. I mean, it's assuming that the
13 participants conducted the same analysis that I did and
14 reached the same conclusions.

15 Q So as to -- so that's Countrywide. As to your JPM
16 comparable that, too, was a pre-litigation settlement,
17 right?

18 A Correct.

19 (Pause)

20 Q And -- sorry. So in JPM there was a cost avoidance
21 discount applied to the settlement, right, or at least the
22 settlement was subject to that cost avoidance discount?

23 A I'm just repeating myself. It -- whether there was a
24 cost avoidance discount is not something that you can tell
25 just because costs were avoided because there's a benefit to

1 both plaintiffs and defendants, and how it cuts in terms of
2 the settlement value is ambiguous.

3 As I said I think frequently it results in a lower
4 settlement value. But in any particular situation you have
5 to analyze the relevant facts and circumstances to know
6 whether a discount exists or in some cases the opposite, a
7 premium.

8 Q But in the case of the JPM it had the effect of a
9 discount, right?

10 A I don't know if it had the effect of a discount.

11 Q You don't? Let's look at your deposition, please, page
12 175.

13 A Okay.

14 Q Are you there, sir?

15 A Correct.

16 Q Were you asked the following questions and did you give
17 the following answers, beginning on page 175, line 7 --
18 well, for completeness I'll start at line 6:

19 "Question: Sorry. I mean, relevance to the value of
20 the settlement. Does it have any relevance to the value of
21 the settlement to you that the fact that the JPM
22 settlement happened before litigation was commenced?

23 "Answer: Yes. I mean, for the reasons that are
24 discussed in my report.

25 "Question: All else being equal, the fact that the

1 settlement occurred pre-litigation would give some form
2 of a discount to the settlement?

3 "Answer: Generally speaking that's correct.

4 Were you asked those questions and did you give those
5 answers?

6 A Yes. And elsewhere I explained what generally speaking
7 means.

8 Q But I didn't --

9 MR. COSENZA: Your Honor, for completeness I think
10 we could start at page 173, line 14.

11 MR. GOLDBERG: 173? Feel free to read it.

12 MR. COSENZA: "Question: So at least in that
13 respect, all else being equal, this case, because
14 essentially being tried versus JPMorgan case is settled
15 pre-litigation, that factor alone, all else being
16 equal, will make a settlement here should be worth more
17 than a settlement in JPM?

18 "It's hard to say --

19 "Objection. Skip. You can answer.

20 "Answer" -- I'm on 173, line 24 -- "It's hard to say.

21 All else being equal, given the settlement history of
22 this case it just becomes an unrealistic question.

23 "Question: This is the hypothetical. All else being
24 equal this case is ready for trial. JPM settled before
25 litigation even was commenced. That fact alone, all

1 else being equal, that would counsel in favor of this
2 case having a higher value than the JPM case, right?

3 "Objection. Skipping over."

4 "Answer" -- line 13 -- "You said it's a hypothetical.

5 It can't be a hypothetical if you were talking about this
6 case in connection with the facts and circumstances of
7 this case. I don't think the question is realistic and
8 an accurate description of the difference between this
9 case and the JPM case or any other case.

10 "Question: Is it a factor to be considered at all that
11 the JPM settlement happened pre-litigation or is that
12 entirely irrelevant?

13 "Answer: I wouldn't say it's entirely irrelevant.

14 "Question: So it has some relevance?

15 "Answer: It has some relevance in describing the
16 relevant background and differences between the
17 different cases."

18 MR. COSENZA: Thank you.

19 BY MR. GOLDBERG:

20 Q You were asked those questions and you gave those
21 answers?

22 A I did.

23 Q And in JPM there was a potential bona fide statute of
24 limitations defense, correct?

25 A Correct.

1 Q And, in fact, that defense was applicable to about half
2 of the trusts, right?

3 A Potentially, correct?

4 Q And there is no statute of limitations issue in this
5 case, right?

6 A As far as I know, correct.

7 Q And in JPM there was a concern about whether or not the
8 certificate holders would be able to give the necessary D&I,
9 right?

10 A I believe that's correct.

11 Q And, again, that issue is not present here?

12 A Correct.

13 Q Let's talk about Citigroup. So Citigroup was also a
14 pre-litigation settlement, right?

15 A I believe so. Correct.

16 Q We don't have to repeat the cost avoidance debate you
17 and I are having right now, but we agree it was a pre-
18 litigation settlement, right?

19 A Correct.

20 Q And we agree that costs were, in fact, avoided,
21 litigation costs were avoided?

22 A Yes. I agree.

23 Q Now there were statute of limitations defenses in
24 Citigroup, right?

25 A Correct, potential ones.

1 Q Potential ones. In fact, so Citigroup involved 206
2 trusts, right?

3 A I believe that's right.

4 Q And of those 206 trusts 117 of them were subject to
5 statute of limitations defenses?

6 A Potentially. That's my recollection.

7 Q Did you do any independent analysis as to whether the
8 statute of limitations defense was valid or invalid?

9 A No, I didn't.

10 Q But the presence of that potential defense drove the
11 value of the settlement down, right?

12 A Correct.

13 Q And, again, there's no statute of limitations issue
14 here?

15 A That's right.

16 Q And, again, in Citigroup there was a concern about
17 whether the certificate holders would be able to provide a
18 direction in indemnity so as to allow a litigation to
19 proceed, right?

20 A Correct.

21 Q And that's not an issue here?

22 A Correct.

23 Q Washington Mutual, the WAMU settlement, there were
24 significant statute of limitations issues there, right?

25 A Yes.

1 Q There were 99 trusts bringing claims, right?

2 A I should remember that, but I don't remember the exact
3 number.

4 Q Well, do you remember that there was 74 of them that
5 had potential statute of limitations problems?

6 A I don't. I remember there was a significant number,
7 but I don't remember the exact number.

8 Q Might I show you a document that might refresh your
9 recollection, sir.

10 A Of course.

11 (Pause)

12 Q Bear with me. Apologies.

13 If you could look in the binder, if someone could help
14 the witness, please, provide him with the Volume 2 binder.

15 UNIDENTIFIED SPEAKER: Which exhibit?

16 MR. GOLDBERG: We are going to look at Exhibit PA-
17 395.

18 UNIDENTIFIED SPEAKER: That's Volume 3.

19 MR. GOLDBERG: Oh, it's Volume 3? Sorry.

20 THE COURT: Three?

21 MR. GOLDBERG: Three. Apologies. It's in my two.
22 Sorry about that.

23 (Pause)

24 THE WITNESS: Thank you.

25 BY MR. GOLDBERG:

1 Q Do you have Exhibit PA-395 in front of you, sir?

2 A I do.

3 Q And do you see this is a petition by Deutsche Bank as a
4 trustee to seek instructions from the Court about whether to
5 approve or not approve a certain settlement?

6 A I do.

7 Q And if you turn to page 23 of 1,517. This is an
8 excerpt.

9 A Okay.

10 Q And do you see there's a paragraph 65?

11 A I see it.

12 Q And do you see under paragraph 65 there's a subheading
13 for statute of limitations?

14 A Yes, sir. I see that.

15 Q And do you see the second sentence reads:

16 "Indeed, in its dismissal motion WMMSC and JPMC argued
17 that as a matter of law the claims for 74 of the 99
18 trusts including all of the WMMSC trusts are time-
19 barred under the laws of either Delaware three years or
20 New York six years as applicable."

21 Do you see that?

22 A Yes, sir, I do.

23 Q Does that refresh your recollection that 74 of the 99
24 trusts at issue were subject to a statute of limitations
25 defense?

1 A It refreshes my recollection that there was a claim to
2 that effect, but it was disputed. I don't think it -- to
3 the best of my recollection that was never resolved one way
4 or the other.

5 Q That's because the case settled.

6 A Because the case settled. Exactly.

7 Q There are also concerns in the WAMU settlement about
8 whether there would be sufficient certificate holder support
9 in order to provide the necessary direction and indemnity to
10 maintain the case? Yes?

11 A I believe so. Yes.

12 Q And there were concerns in WAMU about delays in costs
13 if the litigation needed to be pursued?

14 A You know, that's -- you know, by definition that's true
15 because the litigation didn't end, but that was not a pre-
16 litigation settlement. I mean, that case was litigated for
17 years prior to the settlement so it's a little bit
18 different.

19 Q I'm going to read you a portion of your deposition.
20 I'm just checking because I don't want to pull something out
21 of context.

22 (Pause)

23 Q Sir, if you would turn to page 188 of your deposition?

24 A Okay.

25 Q Were you asked the following questions and did you give

1 the following answers starting on line 14:

2 "Question: In the WAMU settlement there was concern
3 about the delay associated with the litigation and the
4 intended costs?

5 "Answer: That's right.

6 "Question: Which is not at issue here, correct?

7 "Answer: Correct.

8 "Question: It would have the same effect that we
9 discussed with respect to the other settlements with
10 your same caveats?

11 "Answer: Correct."

12 Were you asked those questions and did you give those
13 answers?

14 A Yes.

15 Q And that concern about the delay in costs no longer
16 comes into play in this estimation proceeding, correct?

17 A That's right.

18 Q If you turn to --

19 A You know, actually, let me just modify what I just
20 said. It doesn't come into effect the same way, but
21 obviously this estimation proceeding is a more truncated
22 proceeding no matter how extensive it is as compared with a
23 full blown trial on the merits with all of the factual and
24 legal issues contested.

25 So I don't think it's quite right to say that there's

1 no issues of avoiding a delay in getting a more expeditious
2 result here.

3 Q Well, the issues, the concerns about delay and cost
4 that were present in WAMU, those concerns are not present
5 here, right?

6 A That's correct.

7 Q Sir, take a look at your report if you would. It's --
8 depending on if you either have the plan administrator's
9 exhibit or you'll have ours. Ours is TRX-579.

10 A I -- it's the same report.

11 Q It's the same report.

12 A This is a shorter binder, a slimmer binder --

13 Q That's --

14 A -- so it's easier to work with.

15 Q -- perfectly acceptable to me.

16 Sir, if you take a look at page 29 of your report.

17 A Okay. I have it.

18 Q Do you see that you have a table there?

19 A Yes, I see that.

20 Q And in this table you do analyses comparing realized
21 lost settlement value to come up with a recovery ratio,
22 right?

23 A That's right.

24 Q Now if you look second from the bottom you have the
25 WAMU settlement?

1 A Yes, I see that.

2 Q And you calculate the recovery ratio to be 13.2
3 percent?

4 A That's right.

5 Q So we'll talk about this a little bit, but three --
6 three billion divided by the expected losses of 18.6 billion
7 actually doesn't come to 13.2, right?

8 A Correct.

9 Q That math actually translates to 16 percent?

10 A That's right.

11 Q Or a little above 16 percent?

12 A That's right.

13 Q All right. But you have 13.2 percent because one of
14 the defendants in the WAMU settlement was insolvent in
15 receivership?

16 A That's right. I try to explain this calculation --

17 Q Right.

18 A -- in the report.

19 Q Understood. So you applied some discounted factor to
20 the recovery because the plaintiff wasn't going to get, as
21 Judge Chapman pointed out, wasn't going to get real dollars.
22 It was going to get what I'll characterize as bankruptcy
23 dollars?

24 A I wouldn't say that's exactly the reason, but as I said
25 there is an explanation in the report taking into account

1 that there was a -- both a solvent and non-solvent party at
2 issue in WAMU.

3 Q Well, explain it to me. What's the -- how did you do
4 the calculation? How did you decide how to devise a
5 discount?

6 A Just hold on for one second.

7 Q Sure.

8 A It's explained in a somewhat lengthy footnote, Footnote
9 102 of the report on page 30. And what the footnote
10 attempts to do is to provide the actual cash value of the
11 claim and allocate it to the two claims, the bankrupt claim
12 and the non-bankrupt claim so they both could get either
13 recovery or a proposed allowed claim of 32.2 percent.

14 Q So if I understand it correctly, and by all means
15 please tell me if I get it wrong, you figured out what the
16 recovery ratio was going to be in the insolvency. You took
17 the value of the settlement. You applied that recovery or
18 recovery ratio and then you analyzed how much of the claim
19 was attributable to the non-bankrupt entity, right, or the
20 entity was -- that wasn't --

21 A Generally speaking --

22 Q -- in receivership?

23 A -- that's right and that's why the number is a little
24 different from the 16 percent number that you --

25 Q Understood.

1 A -- refer to.

2 Q And -- right. And that's because the claims against
3 the non-bankrupt entity were getting paid in, again, what
4 I'm characterizing as bankruptcy dollars, right?

5 A I -- you know, I guess you could call it that. Again,
6 there's a fuller description in the footnote, but that's the
7 general idea.

8 Q Do you understand what I mean when I say bankruptcy
9 dollars?

10 A I think so; that you mean that there's part of the
11 calculation in the footnote is for an allowed claim for the
12 bankruptcy part of the --

13 Q Exactly.

14 A -- of the case.

15 Q Exactly. You're given the allowed claim and then you
16 apply that to the recovery ratio in the bankruptcy and
17 that's how you figure out real dollars, right?

18 A Or backwards. You actually know real dollars because
19 of the cash value and then you figure out how that can be
20 applied to both the bankruptcy and the non-bankruptcy part -
21 -

22 Q Fair enough.

23 A -- of the claim.

24 Q Okay. So going back to your Table 29, excuse me, your
25 table on page 29. You actually label it Table 1.

1 A Okay.

2 Q So the Countrywide settlement, that was real dollars,
3 right?

4 A Yes.

5 Q And the JPM settlement, that was --

6 A Well, it was real dollars as well as --

7 Q Non-cash --

8 A -- non-cash dollars.

9 Q But it was valued as real dollars.

10 A That's right. Correct.

11 Q And in JPM it was real dollars, right?

12 A Correct.

13 Q And in Citigroup it was real dollars, right?

14 A Correct.

15 Q All right. I'm not talking about Rescap or Lehman
16 because we've agreed those are at least less relevant to our
17 analysis today, fair?

18 A Rescap for sure and Lehman obviously. Oh, you mean the
19 Lehman securities cap --

20 Q That's what I meant.

21 A -- yes, that's right.

22 Q Okay.

23 A I agree.

24 Q But you -- and now you compare those settlements to
25 what Lehman proposes the allowed claim to be, right?

1 A Correct.

2 Q But that allowance is in bankruptcy dollars. It's the
3 amount of the allowed claim. It's not the amount of actual
4 cash --

5 A That's right.

6 Q -- that the trustees are going to get. So you're --
7 the Lehman proposed allowed claim amount of 11.2 percent is
8 a bankruptcy dollar and you're comparing that to real dollar
9 settlements, right?

10 A Correct.

11 Q So if you were going to do an apples to apples
12 comparison you would have to apply the recovery ratio here
13 in the Lehman bankruptcy to your percentages in order to
14 line it up with what would be a real dollar settlement as
15 your other comparables?

16 A If it were possible to do, correct.

17 Q So hypothetically if I were to tell you that the
18 recovery ratio in this bankruptcy was going to be about 40
19 percent, that would make this settlement, the -- excuse me.
20 That would make the amount that the plan administrator's
21 proposing roughly a four and a half percent real dollar
22 settlement?

23 MR. COSENZA: I --

24 THE COURT: Mr. Cosenza.

25 MR. COSENZA: I object to that. Sidebar. I just

1 --

2 THE COURT: Yeah.

3 (At sidebar off the record)

4 THE COURT: I don't remember where we left off so
5 maybe you could look at your screen --

6 MR. GOLDBERG: We have the --

7 THE COURT: -- Mr. Goldberg.

8 MR. GOLDBERG: -- real time.

9 BY MR. GOLDBERG:

10 Q I believe, sir, that the pending question to you is I
11 want you to assume for hypothetical purposes for me that the
12 recovery ratio in this bankruptcy is 40 percent. Do you
13 understand that?

14 THE COURT: You don't mean that. You don't mean
15 the recovery ratio. You mean the distribution percentage
16 that --

17 MR. GOLDBERG: That's what I mean.

18 THE COURT: -- an allowed claim will receive.

19 MR. GOLDBERG: That's what I mean. Thank you.

20 (Laughter)

21 BY MR. GOLDBERG:

22 Q Do you understand that, sir?

23 A I do.

24 Q Okay. So in that scenario if you were to make an
25 apples to apples comparison on the Lehman proposed claim

1 amount to your other real dollar comparable settlements,
2 that would make the Lehman proposed claim amount in real
3 dollars about four and a half percent; is that right?

4 A It would make it lower. I don't agree that would be an
5 apples to apples comparison. But unless you're defining
6 apples to apples meaning the amount of cash that's
7 ultimately received by the creditors.

8 Q Well, I mean, the -- at least the value in real dollars
9 given to the creditors, whether cash or cash equivalents.

10 A Yes. It -- to the extent that the creditors receive
11 less than a hundred cents on the dollar, then the cash that
12 they receive would be lower than the allowed claim.

13 Q And in the WAMU settlement you did some form of that
14 analysis, right, because one of the defendants was
15 insolvent. You applied a discount to what you characterized
16 as the recovery ratio because some of the claim was being
17 paid in not real dollars, something characterized like what
18 I call bankruptcy dollars; is that right?

19 A Not exactly right for the reasons that I described.

20 Q Forgive me for not understanding. Can you describe why
21 that's not right?

22 A Because we started with the cash value of the non-
23 bankruptcy part and then we tried to allocate that to the
24 recovery ratio for the non-bankruptcy part and also for the
25 bankruptcy part to come up with an allowed claim that would

1 be the same for both.

2 Q Okay. And you did that because the value of the claim
3 against the non -- against the solvent defendants versus the
4 insolvent defendants, there's just a difference there in how
5 the plaintiff would be paid, difference in value, I mean?

6 A Well, yes, by definition because one is an allowed
7 claim and the other is receipt of cash.

8 (Pause)

9 Q Are you familiar with the RMBS put back case that's
10 recently been handled by Judge Castel (ph) in the Southern
11 District of New York?

12 A I don't think so.

13 Q No? Have you heard of the Marm (ph) case?

14 A I don't think so. No.

15 Q Are you aware that the Marm case was -- well, you know
16 nothing about the case; is that what you're telling me?

17 A As I sit here I know nothing about the case.

18 Q All right. That saves some time.

19 MR. GOLDBERG: Judge, this is not a bad time for
20 me to break from where --

21 THE COURT: Sounds good.

22 MR. GOLDBERG: -- I am in the outline.

23 THE COURT: Let's see. Why don't we try to come
24 back at about 2:30. All right. Thank you.

25 MR. GOLDBERG: Thank you.

1 (Recessed at 2:18 p.m.; reconvened at 2:39 p.m.)

2 THE COURT: As the day grows on, when I walk
3 through that door it gets worse and worse.

4 (Laughter)

5 THE COURT: So I apologize for the delay.

6 MR. GOLDBERG: May I proceed, Your Honor?

7 THE COURT: Sure.

8 BY MR. GOLDBERG:

9 Q Professor Fischel, so I want to talk about a few
10 aspects of the Citigroup settlement --

11 A Okay.

12 Q -- that you say is a comparable settlement. Compass
13 Lexicon was actually the entity that was hired to evaluate
14 that settlement for its approval before the Court, right?

15 A That's right.

16 Q And it was Dr. Cornell (ph) who was the specific
17 person?

18 A Correct.

19 Q And he'll be testifying for the plan administrator in
20 this proceeding later on as far as you know?

21 A As far as I know, correct.

22 Q And are you aware that Dr. Cornell did an analysis as
23 to whether certain trusts and certain loan groups within
24 trusts should accept or reject the global settlement?

25 A Yes. My understanding is that's exactly what he did.

1 Q And did you review that at all?

2 A I looked at it. I didn't do an independent analysis of
3 it, but I certainly looked at it.

4 Q So are you aware that in certain circumstances, for
5 instance, if there were trusts or loan groups that did not
6 have a statute of limitations problem, that would be a
7 factor that he would use to recommend that that particular
8 trust or loan group reject the settlement? I'm pulling one
9 out in isolation --

10 A Yeah.

11 Q -- or intending to.

12 A You know, I don't remember that specifically, but that
13 would be logical.

14 Q And one of the factors that he applied was whether he
15 thought there would be sufficient certificate holder support
16 for the loan group or trust to pursue litigation outside of
17 the global settlement?

18 A Again, I don't recall that specifically, but those are
19 the same factors I discussed so that sounds logical.

20 Q Are you aware, sir, that there, in fact, were opt out
21 trusts and opt out loan groups from the Citigroup
22 settlement?

23 A You know, I'm not a hundred percent sure that I recall
24 that. I know just based on my own experience in the
25 settlements that I analyzed that there were some trusts of

1 that nature, so that doesn't surprise me.

2 Q Do you remember we spoke earlier about some of the
3 features of the Citigroup settlement that might make it more
4 or less like this case just earlier today?

5 A Yes, I do.

6 Q Did you do any work, did you evaluate whether any of
7 the opt out trusts had attributes that would make them more
8 or less like this case or more or less like the general case
9 in Citi?

10 A I didn't. I didn't describe it in my testimony, but in
11 the JPM settlement there are a number of trusts, first of
12 all, that I initially recommended should reject the
13 settlement and then a series of separate discussions and
14 recommendations about those trusts, whether they ultimately
15 should accept or reject based on change in circumstances,
16 change in the terms that were being offered, et cetera. But
17 in the Citigroup I did not.

18 Q That's what I'm focused on, Citigroup right now.

19 A I did not.

20 Q You didn't do that?

21 A I did not.

22 Q Okay. So if you could take a look, sir, at TRX-2837
23 which I believe is going to be in Volume 3, hopefully.

24 UNIDENTIFIED SPEAKER: Two.

25 THE COURT: What was the number again, Mr.

1 Goldberg?

2 MR. GOLDBERG: 2837.

3 THE COURT: Thank you.

4 (Pause)

5 THE WITNESS: Okay. I have it.

6 BY MR. GOLDBERG:

7 Q Sir, do you know what a trust instruction proceeding
8 is?

9 A Not by that name, no, I don't.

10 Q Have you heard of something called a TIP proceeding?

11 A Not that I recall.

12 Q Well, if I were to tell you that there are
13 circumstances where a trust sometimes make an application to
14 a court to seek permission on how to behave in certain
15 circumstances, is that type of proceeding something that's
16 familiar to you?

17 A Yes.

18 Q All right. You just weren't aware that it's called a
19 TIP or a trust instruction proceeding?

20 A Well, TIP, I'm not sure I've ever heard that term. You
21 know, trust instruction proceeding, you know, it sounds
22 consistent with the ordinary usage of the English language,
23 so.

24 Q It does indeed. Okay. Well --

25 (Laughter)

1 Q -- let me -- well, we're looking at Exhibit 2837 and
2 what I will tell you when we're going to look at it, this is
3 the results from a TIP proceeding in connection with one of
4 the trusts for Citi.

5 Specifically, sir, can you take a look at the top of
6 the first page where it says, notice of entry of court
7 order? Do you see that?

8 A I do.

9 Q And then do you see underneath it references a trust,
10 Citigroup Mortgage Loan Trust 2003-AMC3?

11 A Yes, I see that.

12 Q And that's one of the Citigroup trusts that was in the
13 settlement that you used as a comparable?

14 A I assume so, but I don't know from memory.

15 Q Do you have any reason to doubt that it is?

16 A No, I don't.

17 Q So if you turn to page 5 of 15, please. Are you there?

18 A I have it.

19 Q Do you see the heading of the document that reads,
20 "Findings of fact, conclusions of law, directions and order
21 for judgment"? Do you see that?

22 A I do, sir.

23 Q Okay. So now if you take a look at page 7 and
24 paragraph 5 at the very bottom -- well, hold on.

25 A I'm sorry. Paragraph what at the very bottom?

1 Q Let me just take one half a step back. Sorry.

2 Apologies for that.

3 Do you see in paragraph 4 on page 7 --

4 A I don't see a paragraph 4 on page 7, period.

5 Q Look at the bottom page 7 of 15. We're looking at that
6 electronically --

7 A Oh, I'm sorry.

8 Q -- page number. No. That's okay. It's not your
9 fault.

10 A I'm looking at the number --

11 Q I know you are. I should have been more specific. I
12 apologize. We're looking at the page number that is TRX-
13 2837 --

14 A I have it now. I'm sorry.

15 Q Okay.

16 A Yes. I see paragraph 4.

17 Q All right. And do you see there's a description there
18 of how this lawsuit is from the group two mortgage loans
19 within this trust?

20 A Yeah. I'm not familiar with the document, so just give
21 me a second to look at it.

22 Q Yes. Absolutely.

23 (Pause)

24 A Okay. I've looked at paragraph 4.

25 Q And do you see the reference that the case is about the

1 group two loans within the subject trust?

2 A Yes, I see that.

3 Q And if you look at paragraph 5 do you see where it
4 reads, "The lawsuit has proceeded through the discovery
5 stage which included, among other things, the trustees'
6 service of expert reports." And it goes on in a way that's
7 not relevant to me here. Do you see that?

8 A I do, sir.

9 Q That's not unlike what's going -- what -- the stage
10 here, right? We've had discovery. We've had exchange of
11 expert reports. That's happened here?

12 A Well, I certainly agree with the second part of your
13 question. To say it's not unlike, you know, that's more
14 complicated.

15 Q At least in -- well, there are expert reports here,
16 right?

17 A There are expert reports here.

18 Q And there's been discovery here?

19 A Correct.

20 Q Now do you see, sir, if you go to pages 8 to 9, again,
21 we're using the 8 of 15 page numbers.

22 A Okay.

23 Q At the bottom of page 8 do you see there's a sentence
24 that reads:

25 "According to one of the experts retained by the RMBS

1 trustees in connection with the global RMBS settlement
2 offer, the estimated payment amount for group two
3 mortgage loans in this trust was approximately
4 \$19,864,960, an amount substantially less than the
5 current offer."

6 Do you see that?

7 A I do.

8 Q And do you see there's a footnote there at the end of -
9 -

10 A Yes, I see it.

11 Q And you see the footnote references that Dr. Brad
12 Cornell was the expert referred to, right?

13 A Yes.

14 Q Now the next paragraph where -- you see where it reads,
15 somewhere in the one, two, three, fourth line down in the
16 middle it reads:

17 "With respect to group two mortgage loans the trustee
18 did not accept the global RMBS settlement offer in reliance
19 upon the expert advice and the directing certificate
20 holders' direction to continue to pursue the lawsuit
21 with respect to group two mortgage loans."

22 Do you see that?

23 A I do.

24 Q Now the next paragraph, paragraph 8, five lines down,
25 do you see the sentence that reads, "The new settlement

1 offer provides for a cash payment of \$37,500,000 by
2 Citigroup to the trustee." And then it goes on. Do you see
3 that?

4 A I do.

5 Q You agree with me that 37.5 million is more than 19.86
6 million?

7 A Yes.

8 Q So what's happened here basically is that this trust
9 opted out of the global settlement that you used as a
10 comparable, right?

11 A Correct.

12 Q And the Citigroup settlement was a pre-litigation
13 settlement?

14 A Correct.

15 Q But this case, the plaintiff trustee litigated for a
16 while anyway?

17 A Correct.

18 Q And it was able to obtain a much higher settlement,
19 right?

20 A Correct.

21 Q And at least with respect to this trust it did not have
22 statute of limitations problems?

23 A I don't know that, but --

24 Q You don't know?

25 A -- it's logical to assume that, but I don't know it.

1 Q Fair enough.

2 Let's take a look at another example. Just to -- in
3 the effort to speed things up it will look similar, but
4 let's take a look at another example. It's the next
5 exhibit, TRX-2838.

6 (Pause)

7 A I have it.

8 Q All right. And I take it before today you didn't do
9 any analysis with respect to the opt out trust that's
10 reflected in Exhibit TRX-2838, right?

11 A No. As I said I've done similar work in other
12 settlements, but not this one.

13 Q Not for Citi you didn't. Understood. So if you take a
14 look at page 5, again, it's at the bottom, 5 of 21 do you
15 see again this is the trust seeking an instruction from the
16 court?

17 A Yes.

18 Q And do you see that if you look at page 9 now towards
19 the bottom of the page do you see where it reads:

20 "With respect to group three mortgage loans the trustee
21 did not accept the global RMBS settlement offer in
22 reliance upon the directing certificate holders'
23 direction to continue to pursue the lawsuit with
24 respect to the group three mortgage loans."

25 Do you see that?

1 A Yes, sir. I see that.

2 Q And that -- the expert in this matter also is Brad
3 Cornell, same expert?

4 A Correct.

5 Q And do you see if you look at paragraph 9 on page 8,
6 first sentence it reads, "The lawsuit has preceded through
7 the discovery stage and dispositive motions have been
8 briefed, but not yet argued." Do you see that?

9 A I do.

10 Q And you understand that this matter has proceeded
11 through the discovery stage as we're here at the hearing,
12 right?

13 A That's my understanding.

14 Q Now do you see, sir, if you look at page 9 at the last
15 sentence in paragraph 10 do you see where it reads:

16 "According to one of the experts retained by the RMBS
17 trustees in connection with the global RMBS settlement
18 offer, the estimated payment amount for group three
19 mortgage loans in this trust was approximately
20 \$20,237,190, an amount substantially less than the
21 current offer."

22 Do you see that?

23 A I do.

24 Q Now if you go to page 10, sir, paragraph 13 --

25 A I see it.

1 Q -- fifth line down do you see the sentence that reads,
2 "The new settlement offer provides for a cash payment of
3 \$38,550,000." Do you see that?

4 A I do.

5 Q And obviously \$38,550,000 is more than \$20,237,000?

6 A Correct.

7 Q And so like the other opt out we just talked about this
8 trust, CMLTI 2007-AHL2, opted out of a global Citi
9 settlement, litigated for a while and got a substantially
10 higher number, right?

11 A That is correct.

12 Q Okay. I have other examples, but I'm not going to
13 belabor the point. But you appreciate that with respect to
14 the Citigroup settlement there are trusts that opted out and
15 ended up obtaining substantially more than they would have
16 obtained in the settlement had they not opted out?

17 A Yes. I accept that.

18 Q You testified about the issue that you characterized --
19 I'm sorry. I can't recall if you called it the collapsing
20 trusts or clean up trusts. Do you remember that?

21 A I do.

22 Q How did you refer to that?

23 THE COURT: Collapsing.

24 MR. GOLDBERG: Collapsing. Just trying to make
25 sure I was bringing up the witness on terminology.

1 BY MR. GOLDBERG:

2 Q So you actually don't address anything about the
3 collapsing trusts in your expert report, right?

4 A No. I didn't know about them at that time.

5 Q And you learned about them shortly before your
6 deposition?

7 A Correct.

8 Q And as I understand it in the main your view is that
9 you think the trustees agreed to the sale at an amount that
10 is comparable to what -- a value amount that is comparable
11 to what the plan administrator thinks the claim should be
12 estimated at here, and you think that's a reasonable
13 benchmark?

14 A I think it is a valuable benchmark. I didn't
15 characterize it the way you characterized it. I didn't
16 characterize my view of it the way you characterized it in
17 your question.

18 Q Why don't you characterize it in your own words?

19 A That the fact that an outside appraiser valued the
20 claims in the collapsing trusts at either the same value as
21 the Lehman proposed allowed claim or lower was, I think,
22 highly supportive of the Lehman proposed allowed claim in
23 this case and fundamentally inconsistent with the trustees'
24 proposed allowed claim, particularly given as far as I'm
25 aware the trustees' failure to object to those results,

1 failure to insist on a different appraiser, given the
2 trustees' duties to the certificate holders that would be
3 effected by a purchase by the master servicer at too low of
4 an amount.

5 Q So you -- part of your -- that's a little different
6 than what you had said at your deposition. Your testimony
7 was once that you thought that the trustees actually agreed
8 to the amount, right?

9 A You would have to show me what, you know, I said. I'm
10 not aware of the trustees affirmatively saying that they
11 agreed. But I think the trustees at a minimum failure to
12 object both to the amount, to the choice of the appraisers
13 who reached those amounts, to me as I said is highly
14 probative economic evidence consistent with the Lehman's
15 proposed allowed claim and fundamentally inconsistent with
16 the trustees' proposed allowed claim.

17 Q Have you -- did you look at the trust agreement on the
18 issue of the collapsing trust before you rendered your
19 opinion?

20 A I looked at the various appraisal reports where the
21 appraisers reached the conclusions that they did.

22 Q Did you look at the trust agreement before you rendered
23 your opinion?

24 A I did not look at the trust agreement.

25 Q Did you -- so I take it you didn't ascertain by way of

1 the trust agreement that the way the collapsing trust
2 transactions work is that it's actually the seller who
3 agrees with the master servicer to sell the trust at issue?
4 You were -- are not aware of that obviously?

5 A I don't think I was aware of that one way or the other,
6 but it doesn't have any --

7 Q Answer my question, were you aware?

8 A I was about to say I don't think I was aware of that
9 one way or another, but that's not what I based my opinions
10 on.

11 Q So would it alter your opinion at all if it was
12 actually Lehman who agreed with the master servicer to sell
13 the assets of the trust at the given amount? Does that --

14 A No.

15 Q -- impact your opinion at all?

16 A It would not affect my opinion at all.

17 Q Not at all? How about the fact that the appraiser said
18 that it didn't evaluate the substance of the claims and the
19 value of the claims independently, would that affect your
20 opinion at all?

21 A I'm not even sure that's accurate given --

22 Q Would --

23 A -- my own review of the appraisers' opinion.

24 Q Would it affect your opinion?

25 A As I said I don't believe it -- your statement is

1 accurate given the representations made by the appraisers in
2 the valuation and opinions that they rendered.

3 (Pause)

4 Q Are you aware that the appraiser just took the number
5 that the plan administrator is proffering here in this
6 proceeding and used that for the valuation number? Are you
7 aware of that?

8 MR. COSENZA: Your Honor, could I have a sidebar
9 on this?

10 THE COURT: Sure.

11 (At sidebar off the record)

12 BY MR. GOLDBERG:

13 Q Professor Fischel, so you did some work on what I'll
14 characterize as damages in this matter, right? You did loss
15 calculations anyway?

16 A In terms of calculating expected lifetime losses,
17 correct, mostly based on just accepting the numbers of
18 trustees' expert, Dr. Snow, but some independent
19 calculations as well that I -- as I understand it your
20 expert, Mr. Finkel, completely agreed with.

21 Q My question is just you did loss calculations, yes?

22 A Yes.

23 Q And put them into two buckets, already realized loss
24 and estimated future loss, right?

25 A That's right.

1 Q And we talked earlier today about the fact that to do
2 the estimated future loss that's when you were using the
3 Andrew Davidson models. Do --

4 A Correct.

5 Q -- you remember that? But on the realized loss
6 component, that's where you took Dr. Snow's calculations,
7 right?

8 A That's right.

9 Q And you didn't find his calculations to be unreliable,
10 correct?

11 A Did not.

12 Q You found them to be accurate?

13 A Correct.

14 Q Now when you did your work to calculate losses you did
15 not look at loss certificates, right?

16 A I did not.

17 Q And you did not look at the expense logs, right?

18 A I did not.

19 Q And you actually didn't look at remittance reports in
20 any detail, correct?

21 A I did not.

22 Q Do you remember at your deposition we were looking at
23 some native file Excel spreadsheets?

24 A I do.

25 Q And at the time you said you couldn't answer questions

1 about them because you hadn't had an opportunity to review
2 those files?

3 A Correct.

4 Q Well, that's -- that was six weeks ago, right?

5 A Correct.

6 Q And so you've had an opportunity?

7 A At least to ask a couple of questions about what they
8 were, correct.

9 Q Well, you've had an opportunity. I'll come to whether
10 you actually did or not --

11 A Oh, I --

12 Q -- in a moment.

13 A Oh, I apologize. Yes. I --

14 Q You've had an opportunity to look at those schedules?

15 A I did.

16 Q Did you?

17 A Not in any detail, no, but I did do some what I would
18 call due diligence just to understand what the schedules
19 were.

20 Q Okay. I am going to want to look through some of those
21 schedules now and start to -- and we're going to put them up
22 on the screen and we're going to look at some native file
23 schedules, okay?

24 A Okay.

25 Q So let's start, and by looking at one document which is

1 a hard copy, but we'll also display it. It is TRX-2818.

2 MR. GOLDBERG: Which binder is this?

3 UNIDENTIFIED SPEAKER: That will be in Volume 2,
4 Your Honor.

5 THE COURT: Binder?

6 MR. GOLDBERG: Two.

7 THE COURT: Two.

8 (Pause)

9 THE WITNESS: Thank you.

10 BY MR. GOLDBERG:

11 Q Do you see on the screen before you, sir, there's an e-
12 mail --

13 MR. GOLDBERG: Oh, Your Honor, I should tell you
14 we are depending on -- I don't fully know exactly which
15 direction this examination is going to turn with the native
16 files.

17 THE COURT: Yes.

18 MR. GOLDBERG: When we're done we're going to be
19 providing demonstratives of snapshots, hard copy of the
20 relevant portions of the native files that we're using.

21 THE COURT: Okay. So I'm not looking because
22 there's nothing in the book except for a sheet that says
23 produced in native, right?

24 MR. GOLDBERG: Is that right?

25 THE COURT: Well --

1 MR. GOLDBERG: Yes. That's -- no, that's fine.

2 That's fine.

3 THE COURT: Right? It actually --

4 MR. GOLDBERG: That's fine.

5 THE COURT: -- says 2818(s) --

6 MR. GOLDBERG: Yeah, which I think --

7 THE COURT: -- right?

8 MR. GOLDBERG: -- is the indicator that it's going
9 to be a native file. Yes.

10 THE COURT: Right.

11 MR. GOLDBERG: That's fine, Judge.

12 THE COURT: Okay. So we're going to get rid of
13 this and then we're going to look at the screen. And then
14 you're going to give me screen grabs of --

15 MR. GOLDBERG: Whatever we --

16 THE COURT: -- wherever you go.

17 MR. GOLDBERG: Exactly.

18 THE COURT: Okay.

19 MR. GOLDBERG: Exactly.

20 BY MR. GOLDBERG:

21 Q Okay. So, Professor Fischel, do you see it on the
22 screen before you? We have Exhibit TRX-2818.

23 A The e-mail? That's --

24 Q Yes, the e-mail.

25 A -- an e-mail. Yes, I see that.

1 Q Yes. Okay. And you see it's an e-mail from a person
2 at Wilke, Horton Nadall (ph), do you see that?

3 A Yes.

4 Q Okay. And that e-mail is sent to Neil Leiberman (ph)
5 and copied to Todd Cosenza, do you see that?

6 A Yes, I do.

7 Q Now I want you to see -- do you see there's a PDF in
8 the e-mail? It's entitled, "Letter from Cosenza to
9 Schuster." Do you see that?

10 A I do.

11 Q Okay. And let's open that up, please. Now can you
12 expand that just a little bit just so it's a little easier
13 to read. There you go.

14 So you see this is a letter from Mr. Cosenza to Mr.
15 Schuster. Do you see that?

16 A I do.

17 Q You understand that Mr. Cosenza is counsel for the plan
18 administrator sitting right here?

19 A I do understand that.

20 Q And you understand Mr. Schuster is my partner for the
21 trustees sitting right here?

22 A I understand that as well.

23 Q Okay. So if you see that Mr. Cosenza is writing about
24 a variety of matters, do you see that?

25 A I do.

1 Q Let's go to the second page. And do you see he has a
2 heading that reads, "Fischel information"?

3 A I see that.

4 Q And then do you see in the second bullet where Mr.
5 Cosenza writes, "You asked for certain data used in Mr.
6 Fischel's calculations." Do you see that?

7 A I do.

8 Q And then Mr. Cosenza describes a few things. Do you
9 see that?

10 A I do.

11 Q I want to focus on the last sentence in the paragraph
12 where it reads, "Attached as Exhibit 1 are the loan by loan
13 values for realized loss," and he's got a Bates number. Do
14 you see that?

15 A I do.

16 Q Okay. Now if we could go back to the cover e-mail,
17 please? Do you see one of the attachments to the e-mail
18 that's part of TRX-2818 is an Excel spreadsheet entitled
19 Exhibit 1, historical losses?

20 A Yes, sir, I see that.

21 Q Can we open that, please?

22 (Pause)

23 Q And do you see -- we're going to put several
24 spreadsheets on the screen at once which is why my colleague
25 is doing the split screen. So you see on the left side of

1 the screen here you've got the Exhibit 1 historical losses
2 spreadsheet?

3 A Yes.

4 Q And you see Column C says, realized losses?

5 A Yes.

6 Q And Column B has trust name?

7 A Yes, I see that.

8 Q And Column A has loan number?

9 A I see that.

10 Q All right. Do you remember in your deposition you were
11 unable to identify the schedule as representing your
12 realized loss schedule because you hadn't seen it before?

13 A Yes.

14 Q Sitting here today now having walked through the e-mail
15 Mr. Cosenza's covering letter and opening the attachment
16 will you agree with me that this is your realized loss
17 schedule?

18 A It appears to be.

19 Q Great. Okay. So now this schedule, right, the Exhibit
20 1, historical losses represents your calculation of actually
21 realized losses for every loan that was at one point in time
22 potentially at issue, right?

23 A The calculation that we used, correct.

24 Q Yes. That you agree is accurate?

25 A Yes. Correct.

1 Q Okay. So if you -- could you scroll to the bottom,
2 please, so that we can get the last row number?

3 Now you see there's -- that means there's 415,922 rows
4 in this schedule. Do you see that?

5 A Yes, I see that.

6 Q And that would indicate that your schedule covers
7 415,921 loans because the first row --

8 A I --

9 Q -- is the title?

10 A Right. I would assume so.

11 Q Right. Okay. Obviously we don't have 415,000 loans at
12 issue here anymore, right?

13 A Correct.

14 Q Okay. So now let's look at a different schedule. Can
15 you go back to the e-mail, the covering e-mail and then what
16 I want to see is the PDF.

17 THE COURT: Can I --

18 MR. GOLDBERG: Yes.

19 THE COURT: -- as you -- you're rolling along here
20 can I just understand exactly what -- can you flip back to
21 the Excel spreadsheet, whoever is driving?

22 What exactly is realized loss? What is that, what
23 kind of loss?

24 THE WITNESS: Those are the losses on delinquent
25 loans that have been foreclosed or modified --

1 THE COURT: Liquidated.

2 THE WITNESS: Liquidated loans. Correct.

3 THE COURT: Thank you.

4 MR. GOLDBERG: Well, I have questions. That's not
5 actually correct, but that's okay. I'll --

6 THE COURT: Okay.

7 MR. GOLDBERG: -- bring it up in cross-
8 examination.

9 THE COURT: Well, I -- I --

10 MR. GOLDBERG: No. It is --

11 THE COURT: I mean, I'm just trying to understand
12 what we're talking about.

13 MR. GOLDBERG: As we understand it to be, and I'm
14 quite confident it is, it is a schedule of realized losses
15 that have actually been incurred by the trusts. It's not
16 limited to liquidated loans, which is the point of the --

17 THE COURT: Okay.

18 MR. GOLDBERG: -- examination.

19 THE WITNESS: No. I --

20 THE COURT: Okay.

21 THE WITNESS: I agree with that. I didn't mean to
22 suggest --

23 MR. GOLDBERG: No. I'm not suggesting your --

24 THE WITNESS: I -- excuse me.

25 MR. GOLDBERG: -- sold anything wrong.

1 THE COURT: I'm not trying to have the answer be
2 one thing or another. I'm just trying to understand what
3 the heading, realized loss, is.

4 MR. GOLDBERG: No. Fair.

5 THE COURT: So --

6 MR. GOLDBERG: That's --

7 THE COURT: Okay.

8 MR. GOLDBERG: -- totally understand.

9 THE COURT: All right.

10 MR. GOLDBERG: Do you have that or do you need me
11 to explain it further?

12 THE COURT: Well, I just don't -- I don't know
13 where -- I don't know what the -- I don't -- I don't know
14 what the question and the answer is to my question. So if
15 you want to clarify it, fine. If you don't, that's fine,
16 too.

17 MR. COSENZA: Your Honor --

18 MR. GOLDBERG: Why don't I put the question to the
19 witness, Your Honor, and --

20 MR. COSENZA: -- I don't know if you want a
21 sidebar to -- I -- whatever your -- I'm just -- I'm confused
22 by this.

23 THE COURT: I --

24 MR. GOLDBERG: Why don't --

25 THE COURT: -- I'm --

1 MR. GOLDBERG: -- we go to sidebar?

2 THE COURT: I'm confused. So generally speaking
3 if I'm confused you ought to clear it up. So --

4 MR. GOLDBERG: May we approach?

5 THE COURT: Sure.

6 (At sidebar off the record)

7 THE COURT: Sorry. We're just trying to keep up
8 with you.

9 MR. GOLDBERG: Okay.

10 BY MR. GOLDBERG:

11 Q So if we could go back to the covering e-mail, please,
12 that's part of 2818. My screen just -- my screen just went
13 black.

14 (Pause)

15 Q Here you go. Okay.

16 MR. GOLDBERG: Apologies, Your Honor. Oh, there
17 it is. It just came back. My screen went black, but it
18 just came back up.

19 THE COURT: Oh, I'm sorry.

20 MR. GOLDBERG: No. That's okay.

21 THE COURT: Okay.

22 BY MR. GOLDBERG:

23 Q Okay. So, Professor Fischel, that same bullet where we
24 have the highlighted language, I want to look at other
25 highlighted language. Do you -- or other language, rather.

1 Do you see in the middle of the paragraph roughly there is a
2 sentence that's now being highlighted that reads, "The
3 output data set was also provided as
4 Lehman_covered_235_output.xlsx." Do you see that?

5 A I do.

6 Q And do you see there's a reference to a Bates number?

7 A I see that.

8 Q And that Bates number is LBHIT7_00004877. Do you --

9 A I see that.

10 Q -- see that? Okay. We're going to open that schedule.
11 And I understand that to be your analysis of future -- your
12 estimate of future losses on non-liquidated loans. Can you
13 look at the schedule that my colleague is opening up now?
14 It would be on the right side of the screen and confirm for
15 me. You can look at the title. If you need the -- if you
16 need Mr. Lee to drive it around the screen to get you
17 comfortable, that's fine, too.

18 THE COURT: Professor Fischel, if you want to
19 drive the screen any particular way, just let Mr. Goldberg
20 know.

21 THE WITNESS: No. I appreciate that, Your Honor.

22 MR. GOLDBERG: I can show you metadata if it makes
23 it helpful to show the --

24 THE WITNESS: You know, I -- I'll accept your
25 representation.

1 MR. GOLDBERG: Okay.

2 THE WITNESS: I can't tell looking at this screen.
3 I know we had a schedule for realized losses, namely losses
4 that had been incurred to date from whatever source and for
5 whatever reason, and another schedule for expected future
6 losses and the two of them together constitute expected
7 lifetime losses.

8 BY MR. GOLDBERG:

9 Q And the expected future loss analysis that you did,
10 that was only for non-liquidated loans, correct?

11 A That's right.

12 Q There would be no liquidated loans in that analysis?

13 A There shouldn't be. Correct.

14 Q Okay. So do you see the spreadsheet that's on the
15 right of the screen at the top? Do you see it's titled
16 LBHIT7_ with the numbers that end in 4877? Do you see that?

17 A I do.

18 Q And do you see how it's entitled, Lehman cover 235
19 output.xlsx? Do you see that?

20 A Yes, I see that.

21 Q That matches the name of the file that Mr. Cosenza put
22 in his letter that we looked at a moment ago that was part
23 of Exhibit 2818, right?

24 A I don't remember that, but if you tell me I'm, happy to
25 --

1 Q Well, do you --

2 A -- accept that.

3 Q -- do you need to see it again? I want to make sure --

4 A No. No. No. I --

5 Q -- that --

6 A Unless you want to show it to me again, but I'm happy
7 to accept what you --

8 Q Let's do it.

9 A -- what you're saying.

10 Q Let's just show it to you. Can you -- do you see the
11 number now there in the highlighted box, sir?

12 A Yes, I do.

13 Q And it matches the spreadsheet?

14 A Appears to.

15 Q Okay. Let's go back to that spreadsheet. So what I
16 want to first do to confirm is that do you see the Column A
17 on the spreadsheet on the right which is your non-liquidated
18 loan analysis? Do you see that and it's highlighted now?

19 A Yes, I see that.

20 Q That's the loan number, correct?

21 A Yes. I assume that's the loan number.

22 Q Right. It's got the trust name as well, but it's got
23 the loan number after the squiggly line, do you see that?

24 A Yes, I see that.

25 Q Okay. I should tell you, too, that -- sorry. The

1 screen that's on the right of your output, we have
2 previously marked as TRX-582. I should have said that
3 before for record purposes. For your purposes you can look
4 at the screen.

5 Now what I would like to show you, sir, is that some of
6 the loans that are non-liquidated actually appear in your
7 schedule of realized loss. So what I would like to do, and
8 I'm going to do this a little randomly just to kind of make
9 the point that they're all there. Can you -- do you see how
10 we start your schedule on the right? It starts at Row 2.

11 A Yes, I see that.

12 Q And could you please go all the way to the bottom? Do
13 you see how it ends in Row 64,921?

14 A Yes, I see that.

15 Q Give me a number somewhere between two and 64,921. It
16 doesn't matter. Any number. Pick a card, any card.

17 (Laughter)

18 A It seems like this is a magic trick so --

19 Q It does.

20 A -- now you've made me suspicious. So why don't you
21 pick?

22 Q No. No. No. I --

23 (Laughter)

24 Q But then I'll get accused of cherry-picking. I want
25 you to pick. Give me any number.

1 A 27.

2 Q 27. Can you go to Row 27, please? And can you
3 highlight the loan number and search for it in the realized
4 loss exhibit that's part -- the realized loss schedule
5 rather?

6 Sir, do you see that loan number from your Row 27
7 appears in the realized loss schedule?

8 A Yes.

9 Q Let's do it one more time. Give me another number, any
10 number.

11 MR. COSENZA: We've already did one.

12 MR. GOLDBERG: What's that?

13 MR. COSENZA: Didn't we just do one?

14 MR. GOLDBERG: I said give me another number.

15 MR. COSENZA: Oh.

16 MR. GOLDBERG: Let's do it again. I want -- I
17 just want to make the point that I want -- I'm going to
18 demonstrate something for you, but I want you to see it's
19 random and putting the power in your hands to make this
20 election.

21 THE COURT: I think the crowd can barely stand it.

22 (Laughter)

23 THE WITNESS: 86.

24 MR. GOLDBERG: 86. You're picking easy numbers.

25 I was thinking we would go to like 30,000 or something. Can

1 you go to Row 86, please?

2 BY MR. GOLDBERG:

3 Q And do you see that loan number there?

4 A Yes, I see that.

5 Q Okay. Can we search for that loan number in the
6 schedule for realized losses? And you see that schedule is
7 there? Excuse me. You see --

8 A Yes.

9 Q -- that loan appears in your realized loss schedule?

10 A I do.

11 Q Okay. Now do you remember that at your deposition we
12 had shown you a schedule that was not one of yours, that was
13 one that we created? Do you remember that?

14 A Vaguely.

15 Q And I told you that we had created a schedule where we
16 took your non-liquidated loans that were on your realized
17 loss schedule that overlap with the loans in Dr. Snow's
18 report. Do you remember that?

19 A I don't, actually, but I'm familiar with the concept.

20 Q Okay. Well, that's what we did at the deposition and I
21 appreciate at the time you had difficulty answering
22 questions about the native files. So we're going to put
23 that schedule up on here as well.

24 A Okay.

25 THE COURT: That schedule being?

1 MR. GOLDBERG: That -- so we have -- and this is -
2 - again, Judge, we're taking some witnesses out of order and
3 doing this a little backwards. Our expert created a
4 schedule which is TRX-586.

5 THE COURT: And that schedule purports to reflect
6 what universe?

7 MR. GOLDBERG: A universe of non-liquidated loans
8 that appear in Professor Fischel's Schedule 5 that we've
9 marked as TRX-582.

10 THE COURT: Of realized losses?

11 MR. GOLDBERG: The realized losses.

12 THE COURT: Okay.

13 MR. GOLDBERG: No. No. Sorry, the non-liquidated
14 loan schedule --

15 THE COURT: Yes.

16 MR. GOLDBERG: -- that are also on the realized
17 loss schedule --

18 THE COURT: Yes.

19 MR. GOLDBERG: -- that are also in Dr. Snow's
20 report. You know, we're not -- the trustees, you know all
21 too well --

22 THE COURT: Dr. Snow's report being the report
23 that has expected future losses?

24 MR. GOLDBERG: It has both. It has expected
25 future losses and realized losses.

1 THE COURT: Okay.

2 MR. GOLDBERG: Okay. So we have -- it's -- and as
3 Your Honor knows all too well, the trustees are not pursuing
4 claims on every single loan. We're pursuing claims on a
5 certain amount number of loans. So we use that as our
6 universe and we --

7 THE COURT: The 74,000.

8 MR. GOLDBERG: Correct.

9 THE COURT: Yes.

10 MR. GOLDBERG: And we took that, we figured out
11 which of those loans were non-liquidated loans --

12 THE COURT: Uh-huh.

13 MR. GOLDBERG: -- that showed up on the --
14 Professor Fischel's realized loss schedule.

15 THE COURT: Okay.

16 MR. GOLDBERG: That's the universe. That's the --

17 THE COURT: Okay.

18 MR. GOLDBERG: That's the spreadsheet we want to
19 look at.

20 BY MR. GOLDBERG:

21 Q Do you see that's the spreadsheet at the top, sir?
22 Professor Fischel, you heard me give that explanation to
23 Judge Chapman?

24 A You know, I see the schedule. Whatever you represent
25 is fine.

1 Q Well, did you understand what I --

2 A Yes. I --

3 Q -- how I explained it?

4 A I completely understood your description.

5 Q Okay. Do you have any reason to believe my description
6 is inaccurate?

7 A I -- like I said no reason to believe it's either
8 accurate or inaccurate. Conceptually I understand the --

9 Q Right.

10 A -- category of loans that you could be describing.

11 Q Understood.

12 THE COURT: So for the sake of the record you're
13 directing the witness to TRX-586?

14 MR. GOLDBERG: Correct.

15 THE COURT: Okay.

16 MR. GOLDBERG: Which is Dr. Snow's schedule.

17 THE COURT: Dr. Snow's schedule that purports to
18 reflect, say it again, realized --

19 MR. GOLDBERG: Non-liquidated loans --

20 THE COURT: Non-liquidated loans as to --

21 MR. GOLDBERG: -- that --

22 THE COURT: -- which there are realized losses.

23 MR. GOLDBERG: And that also appear in Dr. Snow's
24 report that remain at issue in this estimation proceeding.

25 THE COURT: Okay.

1 BY MR. GOLDBERG:

2 Q Okay. You understand that?

3 A I understood everything until the last part. I --
4 maybe I'm getting a little confused.

5 Q What -- the last part when I said they remain at issue
6 in the --

7 A Yes.

8 Q -- estimation proceeding?

9 A Yes.

10 Q Because they are in Dr. Snow's report. The trustees
11 are not seeking to have their claims estimated on every loan
12 that they could. They're seeking to have estimation on a
13 subset of those loans. That's why it's significant to have
14 -- to match them to Dr. Snow's report. Do you understand
15 that?

16 A I didn't understand the last part, but I certainly
17 understand that the trustees are not seeking to recover on
18 every single loan.

19 Q Okay. So let's just stress test this a little bit.
20 And remember how we took -- I had you randomly pick a row
21 and we took that loan number and searched it through your
22 realized loss schedule? Remember how we just did that a
23 moment ago and you called it a magic trick?

24 A Yes, I remember it.

25 Q Okay. What I would like to do this time is do

1 something similar, but I want to take the loan number from
2 Dr. Snow's schedule, TRX-586, and I want to search for it in
3 your other two schedules just to give you some level of
4 comfort that the loans that we have in 586, TRX-586 appear
5 in your schedules. Do you understand that?

6 A I understood what you just said. I don't -- as I said
7 throughout, I'm happy to accept your representation --

8 Q All right. Well, that's --

9 A -- of what's on the screen.

10 Q -- fine. If you're -- so if you're happy to accept my
11 representation that's -- that's fine. We had some
12 difficulty at the deposition which is why I was doing this.
13 But if you're happy to accept my representation as to what
14 TRX-586 is, let's -- happy to proceed that way. Fair?

15 A Yeah, although I don't want to accept your
16 characterization about the deposition, but go ahead.

17 Q I didn't mean to impugn you. I just meant that I --
18 and I thought I explained --

19 THE COURT: Okay. Mr. Goldberg, pick one.

20 MR. GOLDBERG: Pick one.

21 THE COURT: Okay. Let's try to do it through
22 example and see --

23 MR. GOLDBERG: Excellent.

24 THE COURT: -- if it gets any better.

25 MR. GOLDBERG: Okay. I hate to be the one to pick

1 one because somebody --

2 THE COURT: Pick one.

3 MR. GOLDBERG: 9,607.

4 (Pause)

5 BY MR. GOLDBERG:

6 Q Professor Fischel, do you see how that search just
7 happened and that loan from Row 9,607, it was loan number
8 31408776 and it appeared in your schedule of non-liquidated
9 loans? Did you see that?

10 MR. GOLDBERG: You did? Did you do the --

11 THE COURT: Okay.

12 MR. GOLDBERG: Stop. Stop what --

13 THE COURT: Whoever is driving, okay, we're
14 looking at loan 9,607 --

15 MR. GOLDBERG: Row 9607 on the top schedule.

16 THE COURT: Right. So if somebody will highlight
17 that. Right. That's it. That's the only one we're looking
18 at, right?

19 MR. GOLDBERG: At the moment. That's the one
20 we're looking at just to make this example.

21 THE COURT: Right.

22 MR. GOLDBERG: So --

23 THE COURT: Now why don't you highlight it in the
24 box on the lower left?

25 MR. GOLDBERG: So he's got --

1 THE COURT: Lower left. There you go. And that's
2 in the schedule of -- that's the schedule that was provided
3 by Mr. Cosenza, right?

4 MR. GOLDBERG: Of realized losses.

5 THE COURT: Of realized losses. And then on the
6 right -- lower right box we'll highlight it there as well,
7 right?

8 MR. GOLDBERG: Correct. And that's the schedule
9 of Professor Fischel's non-liquidated loans.

10 THE COURT: Okay.

11 MR. GOLDBERG: Okay.

12 THE COURT: Okay.

13 MR. GOLDBERG: There we go. Are we -- you're
14 comfortable?

15 THE WITNESS: So far.

16 MR. GOLDBERG: Okay.

17 BY MR. GOLDBERG:

18 Q I want to look and dig in a little deeper as to a
19 couple of the loans. Now as part of your work, sir, you did
20 some work to analyze what modification losses might be, yes?

21 A Some work, correct.

22 Q So let's search, if you could search TRX-586, please,
23 for the following loan number 32960148.

24 So, Professor Fischel, do you see that loan number
25 shows up in TRX-586 which is Dr. Snow's schedule?

1 A I see it.

2 Q Okay. Let's make sure it's in the other two schedules.
3 So could you search the bottom right one which is Professor
4 Fischel's non-liquidated loans future loss estimate.

5 And, sir, do you see on the screen that loan number
6 32960148 appears on your non-liquidated loan schedule?

7 A I do.

8 Q So you agree with me it's a non-liquidated loan?

9 A It could be both a non-liquidated loan and -- as well
10 as a loan where there's a realized loss if there's a loan
11 modification.

12 Q Okay. But right now I'm focusing on the fact that it's
13 on your schedule of non-liquidated loans, your estimate of
14 future losses for non-liquidated loans?

15 A Yes, I see that.

16 Q Okay. So that means it's a non-liquidated loan, yes?

17 A Correct.

18 Q Okay. Now can you search for the bottom left schedule,
19 the one that was attached to Mr. Cosenza's letter? And do
20 you see loan 32960148 appears in that schedule, sir?

21 A Yes. I see that.

22 Q And that means that loan had -- and you see there's an
23 actual number for the realized loss next to it? It's not a
24 zero. There's a positive value.

25 A Yes, I see that.

1 Q And you see that number is \$147,999.99?

2 A Yes, I see that.

3 Q And that means that loan 32960148 is a non-liquidated
4 loan that had a realized loss in the amount of \$147,999; is
5 that --

6 A Correct.

7 Q -- right? Okay. Let's look a little bit into what
8 that means. I would like you to take a look at Exhibit
9 1283, TRX-1283.

10 MR. GOLDBERG: That one hopefully Your Honor has
11 in a hard copy.

12 THE COURT: What was the number again? I'm sorry.

13 MR. GOLDBERG: 1283.

14 THE COURT: Okay.

15 (Pause)

16 THE WITNESS: Thank you.

17 BY MR. GOLDBERG:

18 Q Sir, do you have Exhibit TRX-1283 in front of you?

19 A I do.

20 Q And do you see, sir, this is a remittance report?

21 A I mean, I see what it's called. It doesn't use the
22 word, remittance, but --

23 Q Well, you said you -- as part of your work, I know you
24 said you didn't study them, but you looked at remittance
25 reports.

1 A Actually, I'm not sure I did.

2 Q So you didn't look at remittance reports?

3 A I don't think so.

4 Q All right. Well, I'll tell you this is a remittance
5 report.

6 A Okay.

7 Q And let us walk through it a little bit. If you could
8 -- actually, sir, bear with me one moment. We looked at
9 this during your deposition, didn't we, this very remittance
10 report?

11 A I don't recall.

12 Q If you could turn to page 266 of your deposition
13 transcript, please. Let me know when you're there.

14 A Got it.

15 Q Do you see on page 266, line 9, I mark as an exhibit, I
16 mark TRX-1283? Do you see that?

17 A Yes.

18 Q And then I ask you, "Question: Have you ever looked at
19 a remittance report?" "Answer: I have seen them. I don't
20 think I've ever really studied one." Do you see that?

21 A Yes.

22 Q And then you see the next page, page 267 --

23 THE COURT: Can I -- can we pause here? Mr.

24 Cosenza, can you come on up?

25 (At sidebar off the record)

1 THE COURT: Come back in about 15 minutes. All
2 right.

3 THE WITNESS: Okay. Thank you, Your Honor.

4 (Recessed at 3:32 p.m.; reconvened at 4:00 p.m.)

5 THE COURT: Please have a seat.

6 MR. GOLDBERG: And I'm virtually done. I just
7 want to point out one thing to the witness --

8 THE COURT: Sure.

9 MR. GOLDBERG: -- in the schedule and then --

10 THE COURT: Take your time.

11 MR. GOLDBERG: -- we're going to be --

12 THE COURT: Okay.

13 MR. GOLDBERG: -- done. But I do need my screen.
14 Well, nobody has a screen. Okay. Here we go. We're good.
15 Okay.

16 BY MR. GOLDBERG:

17 Q All right. Professor Fischel, we're right at the home
18 stretch. The top schedule, TRX-586, that's the schedule
19 that we've showed you just -- I know we took a break. Just
20 to refresh you that's the schedule that shows the loans that
21 are within Dr. Snow's report, that are on your non-
22 liquidated loan schedule, that are also on your realized
23 loss schedule. Understood?

24 A Yes.

25 Q If you could go --

1 MR. GOLDBERG: Brian, if you could go to Column C,
2 please, and if you could go all the way to the bottom.

3 BY MR. GOLDBERG:

4 Q So I would like you -- if you could run this --
5 Professor Fischel, have you run the -- you've used Excel?
6 You're familiar with the program?

7 A Yes.

8 Q You know you can add up numbers in the columns?

9 A Yes.

10 Q Okay. That's what we're going to do right here. In
11 Cell C15632 can you just run the sum formula for the Column
12 A -- Column C. Thank you. Sorry. I misspoke. Column C.
13 And can you put some commas in there so it's easier to read,
14 please, or just (indiscernible 4:01:39) currency. Currency,
15 if you go to the left -- no, no, no, go to the left column.
16 Good enough. Good enough.

17 Sir, do you see that the sum there is that for the non-
18 liquidated loans that are in Dr. Snow's report that have a
19 realized loss, according to your schedule the total amount,
20 the \$772,355,262.02. Do you see that?

21 A I do.

22 MR. GOLDBERG: Your Honor, no further questions.
23 I would pass the witness.

24 THE COURT: All right. Thank you, Mr. Goldberg.

25 (Pause)

1 MR. COSENZA: I just have a couple of questions,
2 Your Honor.

3 THE COURT: Okay.

4 REDIRECT EXAMINATION

5 BY MR. COSENZA:

6 Q Professor Fischel, you just went through this whole
7 exercise of all these spreadsheets and calculating different
8 things and realized losses on loans. In terms of
9 calculating lifetime losses and part of your recovery ratio
10 for the "what liquidated loans is described by Mr.
11 Goldberg," did you do anything beyond accepting what Dr.
12 Snow had provided in his analysis?

13 A No, other than in just a few instances filling in gaps
14 by looking at other data sources, but I would say for all
15 practical purposes we simply accepted what the trustee
16 concluded.

17 Q Okay. And why did you -- why were -- why did you think
18 it made sense to accept what Dr. Snow had done in terms of
19 his calculations of realized losses, both for active and
20 liquidated loan?

21 A Well, for two reasons. One, you know, it obviously
22 minimized areas of disagreement. But as I also said in my
23 testimony we also did some checking and we reached basically
24 the same conclusions and, therefore, it was logical just to
25 for the vast majority of the expected lifetime losses, the

1 realized losses just to take Dr. Snow's numbers at face
2 value.

3 Q And you didn't look at any remittance reports in terms
4 of doing that; is that correct?

5 A I did not.

6 Q And you just looked at Dr. Snow and his calculations as
7 part of this?

8 A Correct. And then, again, later there were other
9 experts who performed similar calculations who reached
10 exactly the same results. So I was pretty confident that
11 what --

12 Q And --

13 A -- we did was reasonable.

14 Q And for the active loans how did you calculate the
15 active loans again, the losses for the active loans?

16 A We primarily relied on Andrew Davidson software, the
17 loan dynamics program.

18 Q And the fact that Dr. Snow's calculations included a
19 realized loss on an active loan, in your view does that in
20 any way proximate the damages that the trustees suffered on
21 the active loans?

22 A No. I think damages are a completely separate
23 question. But that's just a calculation of loss.

24 Q Okay.

25 MR. COSENZA: That's all I have, Your Honor.

1 THE COURT: Okay. Thank you.

2 MR. GOLDBERG: Nothing further.

3 THE COURT: Nothing, Mr. Goldberg? Okay.

4 Professor Fischel, thank you. You're done for the
5 day.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: You can step down. Have a good
8 evening.

9 Be careful.

10 THE WITNESS: I'm just worried about the next
11 person.

12 (Laughter)

13 THE COURT: We will take care of it.

14 So, Mr. Schuster, you'll let us know if tomorrow
15 at nine --

16 MR. SCHUSTER: We're good. I've checked. We're
17 good.

18 THE COURT: Okay.

19 MR. SCHUSTER: Yeah.

20 THE COURT: All right. So --

21 MR. COSENZA: We'll start tomorrow at nine --

22 THE COURT: So we'll start tomorrow at nine.
23 Okay. Very good. Have a nice evening. Thank you.

24 (A chorus of thank you)

25 (Whereupon, these proceedings concluded at 4:05 p.m.)

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WITNESS	EXAM BY	PAGE
PROFESSOR DANIEL R.		
FISCHEL	MR. COSENZA	6
	MR. GOLDBERG	56
	MR. COSENZA	159

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